82-1430

NO.

Office-Supreme Court, U.S.
FILED
FEB 23 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1982

Charles Zoslaw and Jane Zoslaw,
husband and wife,
dba Marin Music Centre,
Petitioners,

vs.

MCA Distributing Corporation, Doug Robertson Advertising, Inc., MTS, Inc., Tower Enterprises, Inc., Warner/Elektra/Atlantic Corporation, ABC Records, Inc., Polygram Distribution, Inc., Capitol Records, Inc. and Capitol Industries-EMI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Maxwell Keith
(COUNSEL OF RECORD)
50 California Street
Suite 955
San Francisco, CA 94111
(415) 981-1361

Attorney for Petitioners,
Charles Zoslaw and
Jane Zoslaw, husband
and wife, dba
Marin Music Centre

QUESTIONS PRESENTED

1. Are small ethical retailers of phonograph records and tapes entitled to the protection of the Sherman Act when a powerful group of seven major nationwide distributors constituting 80% of the desired product agree with multi-chain retailers that their opening of full catalogue record stores on a growth basis will be subsidized by special financial assistance and advertising funds with which to advertise the products of the group a few cents over the price the distributors sell at wholesale to the small ethical retailer?

a. Is not such an agreement implied as a matter of law from the proof of continuous advertising by the few chain retailers named here at such prices? (Example: advertised sell prices of $3.66, $3.88 and $3.99 on $6.98 list compared to cost of the album to the retailer of $3.65.)

b. Is not such an agreement to be proscribed in accordance with the purposes of the law of conscious parallelism?

2. Can a multi-state chain retailer of phonograph records and tapes who has admittedly received the right to purchase at least 80% of the popular selling records and tapes at greatly reduced purchase prices, compared to the prices charged competitive retailers and who has announced that he uses this price advantage to lower prices to "zing" competition escape liability for predatory pricing under Section 2 of the Sherman Act because he is not selling below his cost, although he knowingly utilizes price discriminations to sell the product at below the cost of competitive retailers?

3. a. Does the Sherman Act prohibit a record company from refusing to sell its protected products to a retailer because the retailer has instituted an action to prove that the exclusively controlled

products are subjects of restraints of trade?

b. Assuming that Capitol Records can individually refuse to deal in order to prevent the litigation of its antitrust violations, can its refusal to deal pursuant to a conspiracy to monopolize the sale of records at wholesale and at retail be determined in summary judgment on the showing of parallel conduct by it and its competitors as to list prices, allowance of favorable subdistributor prices to the named chain retailers, of the granting of special financial terms and advertising subsidies to the chain retailers and its attendance at group association meetings?

4. Did the courts have the constitutional power to determine facts on motions for summary judgment especially when such determinations go to general conspiracy issues by reason of U.S CONST. art. I, III; amend. VII?

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I

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II

LIST OF PARTIES

A list of all the parties at the proceeding is contained in the caption.

III

CITATIONS TO OPINIONS BELOW

The opinion of the trial court which dismissed petitioners' Robinson-Patman Act claims against Warner/Elektra/Atlantic, hereinafter referred to as WEA, is reported at 1977-2 Trade Cases ¶ 61,756; a similar ruling in favor of Eric Mainland appears at 1977-2 Trade Cases ¶ 61,757. The order denying petitioners' motion for a preliminary injunction appears at 1977-1 Trade Cases ¶ 61,334. The decision dismissing Capitol Records and its parent Capitol Industries - EMI appears at 1978-2 Trade Cases ¶ 62,269.

The decision of the trial court dismissing petitioners' Sherman Act claims is reported at 533 F. Supp. 540 (N.D. Cal. 1980).

The opinion of the Circuit Court of Appeals for the Ninth Circuit is, as yet, not officially reported and appears at 1982-83 Trade Cases, ¶ 65,078. A true copy of the opinion of the Circuit Court of Appeals is attached hereto as Appendix A.

A true copy of the opinion of the trial court is attached hereto as Appendix B.

IV

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 1, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

V

STATUTES INVOLVED

The statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 and Section 15 of the Clayton Act, 15 U.S.C. § 15. The provisions of the Robinson-Patman Act, 15 U.S.C. § 13 are

also pertinent. These statutory provisions are attached hereto as Appendices C and D.

VI

CONCISE STATEMENT OF THE CASE

A. The Substance of the Case

This is an action brought under the Sherman Act and Robinson-Patman Act by the owners of a retail phonograph record and tape store located in Marin County, California, known as "Marin Music Centre." Petitioners opened a music store in August, 1965. The store was located in Strawberry Town and Country Shopping Center, Mill Valley, California, approximately 10.7 miles from Tower Records' San Francisco store. The Strawberry Town and Country Shopping Center is located off the major U.S. Highway 101. [Excerpt of the Record (hereinafter "ER") 1352, 1364.] Petitioners remained in business until May, 1977.

The essence of the complaint and causes of action is the entry into a

scheme to drive them and other ethical dealers out of business entered into by the seven major distributors of phonograph records and tapes, which as a group, control approximately 80% of the total dollars of sales of the product in the United States (ER 1360-1361, 1865). The major devices used were the subsidizing of the advertising of records and tapes at retail prices a few cents over the cost to the small retailer through the favored retailers by the group of nationwide distributors and the preventing of competition to those prices by uniformly agreeing to charge wholesale prices to them at prices which prevented their competition. In addition, the evidence disclosed the national distributors to have subsidized the favored retailers through the device of granting extended payment times to them at non-interest bearing terms; in effect financing their retail operations.

The Zoslaws lowered their prices in 1974 to match those of Tower Records (ER 1874). Their sales increased but so did their losses (Id.). The Zoslaws sought an injunction against the continuation of these pricing policies (ER 338-340). After failure the Zoslaws closed their Marin Music centre.

B. The Parties

1. Manufacturers or Distributors

Warner/Elektra/Atlantic Corporation (hereinafter "WEA") has been engaged in the business of distributing phonograph records and tapes since 1970 (ER 689). It distributes nationally. It is wholly owned by Warner Bros., Inc. whose parent company is Warner Communications (ER 118). It distributes the records and tapes of Warner Bros. Recording Co., Atlantic Recording Co. and Elektra. The classical line is Elektra Nonesuch. It utilizes the other corporations to manufacture its records -- Columbia Records at Terre Haute, IND. and Specialty Records at

Oliphant, PA. (ER 103). It has seven regional distribution centers (ER 286). WEA distributes a host of labels. Some of the label names are Warner, Atlantic, Elektra, Reprise, Atco, Cotillion and Asylum (ER 280, 1448).

MCA Distributing Corp. (hereinafter referred to as "MCA") is a nationwide manufacturer and distributor of phonograph records and tapes (ER 1321 and 1327-28). It has been involved in sales and distribution of records and tapes since approximately 1954. It acquired Decca in 1970 (Id.). It manufactures records and tapes at Pickneyville, IL and Gloversville, NY (ER 1327) and distributes them through five distribution centers (Id.).

Polygram Distribution, Inc. was formerly known as Phonodisc, Inc. and U.D.C., Inc. (ER 1283). During the period from 1971 to 1973, UDC distributed records manufactured by Polydor, MGM and United Artist (ER 1303). Phonodisc, Inc. acquired U.D.C. in 1973 (ER 1029) and changed its

name to Polygram Distribution, Inc. on or about March, 1978 (ER 1303). Polygram is a joint venture of Philips Lamp Works and A.G. Siemens (ER 829, 837). Its headquarters are in Baarn, Holland. Phonodisc ceased to distribute United Artist records in mid-1975 (Id.). Since November, 1973 it has distributed the labels Mercury, Polydor, DGG (Deutsche Grammophon), Archive, MGM, Phonogram, Phillips, RSO and Verve (ER 829). It utilizes the manufacturing facilities of Columbia Records and PRC Recording (ER 829).

ABC Records, Inc. (hereinafter "ABC") is a wholly owned subsidiary of American Broadcasting Company. It was a national manufacturer and distributor of records and tapes. Its labels include ABC, Dunhill and Impulse (ER 958, 998). It was acquired by MCA in 1977 (ER 1866).

Capitol Records (hereinafter "Capitol") is a national distributor. It is wholly owned by Capitol Industries, EMI, a subsidiary of EMI, Ltd., an English cor-

poration (ER 961, 1003). Capitol has five manufacturing and six regional distribution warehouses (ER 1072). Its artists include: The Beatles, Helen Reddy, Yehudi Menuhin, Andre Previn and Beverly Sills (Id.). It acquired United Artists Records (ER 1866).

Other nationwide distributors were named in the complaint: CBS, Inc. and RCA Corp.

Eric-Mainland was a wholly owned subsidiary of United Artists Music and Records Groups, Inc. (UAMARGI), owned by Transamerica. It was named as a defendant. Eric-Mainland was a regional distributor and rack jobber. It was acquired by UAMARGI on December 8, 1969 (ER 37, 321-322). It had distributed the A & M Records and Motown labels (Id.). It went out of business in 1976 (ER 1390).

2. Respondent Retailers

MTS, Inc. (hereinafter "Tower Records") is a holding company of the various stock holdings in operating

companies founded by Russell Solomon and an operating company of three stores (ER 959-60, 1039, 1355). It grew from two stores in Sacramento to 15 stores in California, Washington and Arizona by August, 1976 (ER 1040, 1355, 397). Tower Enterprises, Inc. is a store operating company of the Tower Store in San Francisco (Id.)

MTS' volume of sales in 1975 was $20,000,000 (ER 1364). Its majority stockholder and president, Mr. Russell Solomon, announced to the trade in a magazine interview that "we let our competitor do his thing and then zing the shit out of him" (ER 1385 - 1386). MTS purports to do business as a distributor, Central Valley Record Rack (ER. 1365, 1451). All named distributors shipped direct to the Tower stores and picked and packed to its order as of the time of the filing of the complaint (ER 1377, 1520 - 1522).

Tower Records was WEA's seventh ranked account, and ABC's third ranked account.

MCA showed that Tower Records accounted for 23% of its entire Northern California sales and 56% of its San Francisco Bay Area sales (ER 1364-1365). Analysis of WEA's 1975 San Francisco branch sales (excluding IEC) showed Tower Records to have 24% of the total branch sales. At 24%, Tower Records, was WEA's largest purchaser in the branch (ER 186-189). By 1975 Tower Records was purchasing a million dollars of records a year from Capitol (ER 1099). Phonodisc sales to MTS were shown to be about $350,000 per purchasing cycle in 1975 (ER 2130).

The Tower store in San Francisco became a showcase. The distributors painted hot selling album covers on the front of its stores, entered into extensive performer promotions at the store and gave the store a disproportionate amount of in-store servicing (ER 1409, 243-249). As stated in a WEA document dated 1974 discussing the Tower Records account "I feel too much time is being spent catering to

the whims of MTS and this habit should be changed." (ER 254.)3. Other Retailers

3. Other Retailers

Integrity Entertainment Corp. (hereinafter "The Wherehouse" or "IEC" or "Integrity") opened stores in California in September 1970 (ER 959). It opened a central warehouse for distribution in 1974 the Gardena warehouse (ER 626, compare to ER 1986-1988). It began with 6 stores in the State of California (Id.). It grew to 90 stores by November, 1977 (Id.).

Discount Records (from time to time called "Disro") acquired in 1969 by CBS, was a full catalogue retail record store operating company doing business throughout the United States (ER 1365). Its national volume was about $20,000,000 (ER 1366). It operated 7 stores in the San Francisco Bay Area (Id.).

From the time of acquisition it grew from a chain of 20 stores to 70 stores in 1973 (ER 1365). In 1976, many Discount Records stores were acquired by Pickwick

International. Pickwick was identified as being owned by Heileicher Bros., who also owned J.C. Marsh Co. and Musicland, a rack jobber and retailer. Pickwick has since been acquired by American Can Company (ER 1366).

The Record Factory (Mighty Fine Distributing) grew to 9 stores in four years, 1971-1975 (Id.). Its 1975 sales were $3,320,000 (ER 1366). It received the right to pay for products from WEA on the basis of non-interest bearing notes for the period October 1973-1974. Its president was Mr. John Iott (Id.).

Odyssey Records (Cash and Carry) expanded to six stores in nine years, 1966-1975. Its 1974 sales were $3,149,151 (ER 1367). Its president was Rich Bullock, an ex-employee of Tower Records (ER 1367). WEA had allowed it to pay for products with trade acceptances (Id.).

Banana Records (Maya Corp.) was to grow to nine stores in one year, 1972, and was allowed non-interest bearing notes by

WEA to pay for its products (ER 1367-1368). Its 1975 sales were $1,140,942 (ER 1368).

Advertising Agency. Doug Robertson, Inc. was named as a defendant herein. It was Tower Records' advertising agency at all times herein. It owned 5% of many of MTS's operating subsidiaries (ER 1355). It allowed Tower the use of invoices from radio stations to the agency for the purpose of passing on its advertising agency commission from the media of 15% to Tower Records in return for salary and stock (ER 1383-1385).

C. Concentration of Distribution of Records and Tapes in the Hands of Seven Major Distributors and Price Uniformity Was Disclosed.

1. The defendant distributors constituted approximately 85% of the popular records and tapes sold by the retailers involved here (ER 1359-1361, 1865). An analysis of MTS' 1974 accounts payable ledger (ER 1917) showed: Columbia Records - 25.8%; WEA - 9.46%; Capitol - 9.37%; MCA - 8.67%; Phonodisc - 10%; RCA - 9.59%;

Eric Mainland Co. - 7.35% (ER 1917, 1865, 1360-1361).

2. The price structure of major distributors of records are based upon a list price. The list price has been uniformly raised along with uniform increase in price sheets to each class of trade by the identified group of major distributors. Petitioners established the uniform increase upwards with substantial uniformity as to the increases to each classification of trade on three occasions between the period 1972 and 1978. As of 1972, the key list price was raised from $4.98 to $5.98 LP and $6.95 tape. Dealers were charged between $3.04 and $3.16. The sub-distributors were charged between $2.86 and $2.89 (ER 1497, 1523, 1454, 1449). By the fall of 1974 the key prices had been changed from $5.98 to $6.98 (ER 1498-1503). Wholesale prices went up from $3.05-$3.16 to $3.61-$3.65 as to retailers and $3.38-$3.40 as to the sub-distributors (ER 1454, 1504).

The entire industry went from $5.98 to $6.98 with consequent changes at wholesale in a six month period of time (ER 1400).

No respondent has proffered testimony that the upward movement of price lists to identical levels are based upon costs. No respondent has proffered any cost analysis to justify its adoption of the industry-wide key list prices or to justify the specific prices charged in each category.

The price lists of the seven majors applied the prices as a national price without regard to costs of transportation and volume of orders as to all accounts from 1971 to the filing of the complaint (MCA, ER 457; CBS, ER 633-640).

D. Concurrently with the Consolidation of Distribution in the Hands of Nationwide and Worldwide Companies, the Retailing of Phonograph Records and Tapes Became Concentrated in the Hands of Those Who Were Either Owned by Nationwide Distributors or Who Assured the Distributors They Would Undertake Chain Store Expansion on the West Coast and Who Would Enter into "Under the Table" or Fraudulent Conduct to Obtain Discriminatory Allowances.

A clear division took place between ethical and unethical dealers. Unethical retailers received sub-distributor prices notwithstanding the existence of Federal Trade Commission Trade Practice Rules for The Phonograph Industry originally published in November 8, 1964, 4 CCH Trade Reg. Rep. ¶ 41,067; 29 F.R. 1394. (These Trade Practice Rules were rescinded on September 22, 1978. 43 F.R. 44, 483; 4 Trade Reg. Rep. ¶ 41,014, p. 42, 127.) They required the good faith application of functional discounts (ER 1358-1359). See pages 29-30, infra.

It will thus be shown that the industry has determined that the consumer is to do his shopping at a few subsidized locations at the option of foregoing substantial price savings. The closing of petitioner's store based on inability to meet competitive prices is only what has occurred all over the West Coast of the United States, and, inferentially, the entire nation.

E. Analysis of the Relevant Markets Showed that the Nationwide Distributors Subsidized the Growth of Multi-chain Retailers

1. Preliminary: The distribution and retailing of phonograph records and tapes

a. The basic products

The basic product is a 33 RPM 12 inch record album referred to as an LP (ER 1357). Prerecorded tapes are also included. They are boxed in cartridges and cassettes (ER 117). Record albums are duplicated from master recordings. Master recordings may be recorded anywhere in the world (Id.). Record albums and tapes are sealed in clear plastic wrappers which are to be opened only by the ultimate purchaser (Id.). There are only a few companies involved in duplicating of tapes. Tape sales constitute approximately 30% of the sale of albums (ER 1357). Long playing albums record several performances. Albums most frequently record the performances of known artists or groups (Id.). The record companies, such as Capitol

Records, enter into exclusive performance contracts with such artists (ER. 1072, 1131). Distributors also distribute "singles" which consist of a single performance of short duration (ER 1448). The product may also be categorized in terms of the music performed, i.e., pop and classical (ER 419-424, 1448).

b. Manner of distribution

The major distributors are the nationwide distributors or their wholly owned subsidiaries. Distributors sell direct to retailers or sub-distributors. Sub-distributors are divided into "rack jobbers" or "one stops" (ER 690, 350). Rack jobbers charge the retailer for the services of maintaining his inventory and supplying him with records (ER 350). "One stops" sell to retailers. "One Stops" do not maintain a full catalogue or all the new releases of major distributors. Sub-distributors charge more than distributors in the resale to the retailer (Id.). National distributors allocate substantial sums

for newspaper and radio advertising. In-store promotions, promotional appearances by artists and promotional paraphernalia are also used to excite interest in records (ER 1378-1380, 1407-1409). The key to higher volume is radio play. The consequent charting of playtime called "chart action" is self-perpetuating. The record gathers momentum when more and more stations play it. This generates further orders which generates further promotions which generate further radio time until the record reaches the top echelon of the chart or loses ground. The promotional funds used in obtaining radio time and customer recognition is of utmost importance. Extensive dollars are spent by the major distributors on releases which are deemed to be potential successes. At this point a critical cost factor is met. Newspapers have established two different rates: nationwide rates and local rates. Nationwide distributors are charged higher rates than retail stores.

Radio stations, as do newspapers, grant volume discounts and enter into special contracts with volume users (ER 1378).

2. San Francisco-Marin County: A microcosm

Media newspapers of general circulation: San Francisco Examiner; San Francisco Chronicle; Sunday Examiner and Chronicle (ER 362); San Rafael Independent Journal (ER 349).

Rock/Pop radio stations in San Francisco: KSAN, KNEW, KYA, KFRC, KDIA, KJAZ, KSFX, KEEN, KSOL, KIME, KRE, K101, KSJO, KLIU, KTIM (San Rafael, ER 1363, See also 2071-2072)

Classical radio stations in San Francisco: KKHI, KDFC.

The only record stores which advertised in the San Francisco newspapers were Tower Records, The Wherehouse, Discount Records, Odyssey, Record Factory, Marin Music and Gramaphone (a plaintiff in a similar lawsuit which was to be consolidated with the instant case) (ER 1364).

The named retailer conspirators dominated advertising and placed the ethical retailers into a price squeeze subsidized by the national distributors. Petitioners presented a schedule compiled from Doug Robertson's files containing the notes of telephone calls from distributor representatives or media representatives and indicating the price to be advertised (ER 1380, 1455-1463). This schedule showed, in part, the following:

National Distributor Advertising of $6.98 List Through Tower Records 1974-1975

Advertised Price	Cost to Zoslaws (ER 1454)	Radio Station, Year	National Distributor
$3.66	$3.57	1974, KYA	MCA
3.66	3.65	1975, KFAC	Capitol
3.64	3.99	1975, KSAN	ABC
3.64	3.66	1975, KRE	Phonodisc
3.65	3.99	KYA	WEA(ER 1474)

The record disclosed the total 1976 advertising subsidies to Tower Records as follows, in part (ER 1476):

MCA	$ 29,740
Capitol	127,325
ABC	49,429
Phonodisc	35,429
WEA	138,942

Mr. Zoslaw swore that there were constant price advertisements below his cost (ER 349, 1385, 1866).

Tower's bin prices (at the store) were shown to be $3.66 and $4.66 on $6.98 list (ER 1385). By May, 1976 Tower Records was advertising with 306 radio spots every weekend in Northern California based on subsidized advertising funds from the major distributors (ER 1383-1385). These spots advertised the records and tapes of those defendants as a group, called 8 in 1 or 4 in 1 advertising (Id.). The story of week after week distributor advertising of $6.98 list at $3.88 and $3.99 through Tower Records for the entire period 1976-1977 is disclosed at ER 2041-2104.

The Wherehouse opened in Corte Madera, California, in 1971. 1971 list price for LP's was $4.98. Marin Music costs for the $4.98 list were $2.50 - $2.58. The advertised sales price of The Wherehouse for $4.98 list was $2.69 (ER 1386). Its second anniversary sale was in 1972. It

advertised $5.98 list at $2.99. (Marin Music Costs were $3.05 to $3.11 (ER 1454); The Wherehouse advertised $5.98 list at $2.99 in 1974 (ER. 1386).).

In 1976 Banana Records and The Record Factory opened stores in Marin County. The $6.98 lists were advertised at $3.66, records and $4.66 tapes (ER 359), $3.77 (ER 360), five for $17.90 (ER 361).

In July 1976, The Wherehouse's Corte Madera store had window posters showing $3.66 pricing (ER 1874).

Discount Records were granted extensive funds for advertising in the San Francisco market (ER 150-165, 186-187, 557, 1099, 2003).

Between the period from 1965 to 1977 six broad category record stores were in operation, and three closed their doors (ER 1872). During the same period only seven of 33 limited inventory stores survived. In composite, only 10 stores out of 39 which were engaged in selling records at retail in Marin County during

this period survived past July, 1977 (ER 1873).

F. Combination and Conspiracy

1. The distributors directly financed the growth of the chain retailers on the West Coast.

The nationwide major distributors, as a group, became banker and consignor to the chain retailer, affording it the right to make payments based on special delayed payment terms, the acceptance of non-interest bearing notes and the granting of special return allowances. Retailers were advised that they were to make payment to the distributor on the basis of 60 days (WEA: ER 209, 214; MCA: ER 470; CBS: ER 652; Phonodisc: ER 841, 844; ABC: ER 1954; Others: See ER 1393-1394; 1402-1403; See ER 1480-1481 "past due" refers to over 60 days; ER 1393).

At meetings of the Credit Managers Association every month or when called, each named defendant distributor freely circulated the violation of the 60 day terms by the favored retailers and the

acceptance of notes or other devices to extend time of payments (ER 1393-1394, 1402-1403).

The objective of centralizing the displaying of and the purchase of the group's phonograph records and tapes by the retailer defendants is disclosed in the following study of Mr. Charles Zoslaw as to Tower Records showing the acceptance of non-interest bearing notes by the individual distributors (ER 1902-1913):

WEA (between 10/76 & 11/74)	$2,263,982
MCA (7/73)	$34,498
ABC (9/72-3/74)	$412,084
CBS (5/73 - 11/74)	$615,989

Other chain retailers received the privilege to pay on such a basis (ER 1366, 1367, 1368).

These credit manager meetings were used to discuss what action was to be taken in view of financial developments with specific West Coast accounts (ER

1393-1394; 1402-1403, 1537-1543, 2119-2130). Group action was taken to maintain the chain retailers in operation when individual judgments would have jeopardized the credit risks freely granted (Id.). The Wherehouse was kept in business by not pulling the string when it reported a $1,000,000 theft of inventory (Id.).

The opening of new stores by the favored retailers was the result of cooperation and special credit terms among the distributors (ER 1404-1405). Special return allowances by the distributors were generously allowed (ER 186, 557, 1099, 1876-1883).

Defendant distributors became allied with the west coast or nationwide chain retailers. The record shows the following:

1. The distributors requested and received false affidavits that the retailers functioned as subdistributors and did not own retail stores (Capitol: ER 1370; MCA: ER 1372-1373; RCA: 1374) or

distributed through central warehouses (CBS: ER 641-647; 1514-1515).

2. The distibutors granted under the table or phony discount arrangements at between 6% to 10% of the chain purchases (ABC: ER 1369-1370; CBS: ER 1371-1372; UDC-Phonodisc: ER 1374-1375 (3% or $.05), 1377; WEA: ER 1375-1376; Eric-Mainland: ER 1377-1378 ($.07)).

3. After the filing of the Zoslaw complaint, WEA and CBS purported to base pricing on central distribution but entered into sub rosa arrangements with their shippers to allow false designation of origin of the shipments to be used (ER 1521-1522). MCA failed to apply its volume purchase structure to Tower Records and granted it an undeserved classification (ER 500-501; ER 1428-1429). This was at the very time it was attempting to prevent Tower from taking a 2% unearned timely discount allowance (ER 1403-1404).

4. Advertising funds were used by the group to price squeeze the ethical retail-

er into closing their stores or entering into bankruptcy (See Section "D" supra). The distributors pretended to extend co-operative advertising programs to retailers on a proportionately equal basis (ER 204-207, WEA; 2023-2032, ABC; 859-866, Phonodisc; 470, MCA; 1098-1100, Capitol).

In fact, as has been seen, the distributors called the retailer's advertising agency or the media, placed the advertisements, specified the advertised sale price and give the authorization number for the retailer to make the claim for distributor payment (ER 1380, 1455, 1463). Often the distributor would send the radio station a spot, tag the name of the chain retailer at the end of the advertsement (ER 1380), and authorize credits for the radio costs to the chain retailer (ER 1464-1475). Petitioners proved the existence of the practice of Doug Robertson's purchase of radio time for 4 in 1 or 8 in 1 advertising whereby a distributors' labels would be advertised along with other members of

the group (ER 1384).

5. Grossly disproportionate allocation of advertising funds was shown: WEA 1975 sales report disclosed $105,002 in advertising credits to Tower Records or 50.7% of the total advertising credits shown of $207,291 (ER 186-189). The record showed a special WEA advertising authorization log with Integrity (ER 241).

MCA never disclosed to petitioners an asserted ability of all retailers to obtain 3% of purchases in advertising credits (ER 620-621). In fact, The Wherehouse received $27,820 from MCA in the first 8 months of 1976 or 5.7% of purchases (ER 557); Tower Records received $26,508 in 1975 or 3.6% of purchases (ER 556). The MCA advertising log disclosed disproportionate subsidies (ER 575-590).

ABC's advertising analysis of the last 8 months of 1976 disclosed Tower and The Wherehouse received $37,852 of coop advertising funds or 27.7% of the total (ER 2002). The small retailers received a

total of $16,078, or 11.9% (Id.).

Capitol Records for the year ended June 30, 1975 granted Tower Records and The Wherehouse approximately $140,000 in advertising subsidies. Marin Music Centre received $99 (ER 1099).

Phonodisc did not inform petitioners of their special authorizations and promotions (ER 1533-1534). It subsidized Tower Records with $35,429 in advertising funds in 1976 (ER 1476).

Further, the advertising credits granted by the distributor were knowingly in excess of the actual cost of the chain retailers' advertisements (ER 1383-1384). This allowed the retailers to make a profit on the advertising itself.

6. There existed parallel refusals to allow petitioners to meet competition.

Petitioners made a determined and unsuccessful attempt to obtain price quality with other retailers. They wrote to each of the defendants named in the complaint below and attempted to obtain equal

pricing and treatment. UDC had granted Marin Music a mid-price and so had London Records, (ER 1449, 381-382). This effort commenced about 1973.

Eric Mainland: Mr. Zoslaw attempted to deduct the believed price differential granted by Eric-Mainland to the chain retailers from his payments in 1973. He was then placed on "hold" (ER 1390). Elliott Blaine, Eric-Mainland's General Manager, admitted to Mr. Zoslaw that "inequality in business goes on all the time" (ER 354).

ABC: In August, 1973 petitioners asked Mr. Lou Verzola, ABC's Manager, whether ABC sold to "The Wherehouse" at the same price it sold to him. A luncheon meeting was held September 1973. Mr. Verzola then threatened to call Mr. Zoslaw's employer, the President of the Oakland Tribune, and tell him that Mr. Zoslaw was running a music store on the side. ABC had erroneously sent an invoice to petitioners showing sub-distributor

pricing, but then retracted and corrected them. At the luncheon meeting Mr. Verzola admitted that petitioners' competitors were obtaining better pricing (ER 351), but ABC refused to grant any allowances on the prices (ER 1449). Mr. Hartstone's, President of The Wherehouse, letter to Mr. Knowland, dated shortly after the luncheon meeting, complaining of his treatment and critical of Mr. Zoslaw, was found in the files of ABC (ER 1945).

Capitol: The Branch Manager of Capitol Records, Mr. Larry Binns, was contacted in November, 1973. He told Mr. Zoslaw to send him invoices. He was specifically told that Capitol would like invoices from one of the following companies: RCA, WEA, MCA, Columbia (ER 352, 368).

An invoice for an RCA program was sent by Mr. Zoslaw (Id.). No response was received and on February 13, 1974 Mr. Zoslaw requested answers. Mr. Zoslaw followed with a request to Mr. Zimmermann,

Vice President of Marketing of Capitol. No response was received from Mr. Zimmermann (Id.). The deposition of Mr. Zimmermann disclosed that Capitol Records was authorized to accept a retailer's invoices from UDC or London Records to justify lower prices (ER 1077) but no one at Capitol had ever informed Mr. Zoslaw of this fact (ER 1386). The first complaint was filed in January, 1975. Settlement was made in June, 1975 with Capitol. Immediately after the filing of the dismissal, Capitol would no longer sell any product to the Marin Music Centre (ER 352-353). It failed to disclose its intention to refuse to deal during the settlement negotiations (ER 1075, 453-454).

RCA: In August, 1973, Mr. Zoslaw requested a meeting with Charles Rice, the Branch Manager. Mr. Zoslaw informed RCA that London and UDC (ER 354, 1387-1388) were selling him phonograph records and tapes at lower prices than RCA (Id.). The September, 1973, letter stated (ER 382):

> "... in order to combat our sales losses and image of grossly over-pricing, I have lowered our selling price to what apparently is the real retail price in our market. However, to sell at the competitive price and not to be purchasing at the equivalent price structure is a paradox ... we favor London Classical Catalog since our net price on the $5.98 list is $2.72 ... Your $6.98 list nets to us at $3.45 compared to a net of $3.23 from UDC ...."

On December 22, 1973, Mr. Zoslaw urged RCA to advise him of its decision. RCA stated its policy as a two category system, dealer and sub-distributor, and a willingness to sell to a customer at a lower price when it is satisfied that a major company is actually selling at a lower price and that it would meet, but not beat, competition (ER 383). Mr. Zoslaw pointed out his ability to qualify for the lower price by telex 1/16/74 (ER 384). No allowance was ever received (ER 353).

CBS: Mr. Zoslaw wrote a letter to CBS in June, 1973. His first communication was with Mr. Paley, the President (ER 1389). CBS' correspondence disclosed

inconsistent positions. Mr. Zoslaw was told by Donald E. Biederman that its price was cost-justified, that specifically The Wherehouse, a chain of more than 40 stores was serviced through one central warehouse and a salesman called at one location rather than 40, and it billed one account rather than 40 (ER 353). Mr. Zoslaw replied by stating that Mr. Biederman's letter was in direct contrast to the statements of his West Coast Branch Manager, Mr. Chuck Inman and Mr. Del Costello, its West Coast Regional Manager (ER 353). They stated that CBS would service and ship direct to the individual retail stores of Tower and The Wherehouse but were billing them at the same prices charged Marin Music (Id.). In truth, of course, these chains were receiving direct delivery by store and were receiving sub-distributor prices (ER 1389). Columbia is one of the companies that gave "under-the-table" credits via a billing transaction, Code 48, which allowed 6% and 10% of

total chain purchases as credits (ER 374-375).

WEA: In February, 1974, Mr. Zoslaw wrote to Russ Bach, Regional Branch Manager, seeking clarification of its pricing policies. He requested information as to whether or not other retail dealers in the Bay Area were charged a price lower than the Zoslaws, and, if so, what the prices were (ER 355). On February 26, 1974, Mr. Bach wrote a letter claiming a policy of only allowing differentials to accounts which fulfilled the sub-distributor function (ER 385). He enumerated six conditions (ER 385-386): "1. Each sub-distributor will have a distinct facility for redistribution. 2. Shipments made by WEA will be made to the warehouse. Returns must be made from the warehouse. 3. Representatives will call only at the subdistributor centers. 4. All orders will be in a factory box lot quantity. 5. Proper representation of WEA product must be maintained. 6. Account must

redistribute the majority of record labels to qualify as a sub-distributor. The "[r]edistribution of WEA products alone is not sufficient."

This reply was shown to be absolutely false (ER 355-356). Mr. Hartstone had written a letter on January 2, 1974 to RCA at approximately the same time as Mr. Bach's letter to petitioner (ER 1989). It was found in the files of ABC (ER 1944-1945), stating in pertinent part:

> "... we receive direct all store freight prepaid freight services from all of your competitors except Columbia and WEA, and at the same or lower prices than charged by you. Even in the case of WEA and Columbia there are 'offsetting' arrangements from time to time, including some direct store prepaid shipments and/or special handling of the freight involved."

Mr. Zoslaw documented by means of the special coding between WEA and The Wherehouse the direct deliveries to its Corte Madera store (ER 289-290, 1389, 1479). WEA had granted Integrity 5% and 10% of sales as special discounts. Integrity

used blanket bills of lading (ER 356, 387, 279, 141-142). As to Tower Records, Tower never had a central warehouse, yet received the equivalent of the sub-distributor price (ER 1520-1522). At the time of Mr. Bach's letter, WEA was shipping direct to all Tower stores and it was giving Tower "under the table" credits of 7% (5% plus 2%) (ER 193-200). In February 1974, Mr. Russell Solomon demanded and received the subdistributor price (ER 193-194). Mr. Solomon knew he did not have a central warehouse for redistribution; he knew he did not have a fulfillment warehouse at any address (ER 93, 195-199, 1377, 1521, 1947, 2138-2160). That the "A" price was given in 1975 after receipt of the letter is further evidence of MTS' commitment to a scheme. A subterfuge scheme was worked out between Tower and WEA for shipments to Tower Records. WEA allowed Tower to designate its warehouse as a pickup on a will-call basis for orders already picked and packed for deli-

very to each store. Direct shipment was made to all of the Southern California stores of Tower Records. The means used was a preprinted label provided the truck lines by Tower which falsely stated that shipment was from Sacramento to the numbered store covertly encoded into the order number on the carton by its store number (ER 1521-1522). As for Tower's Northern California stores, deliveries were declared to have been made to Tower's Sacramento facility, but WEA prepacked and encoded each shipment for individual store delivery from Sacramento (Id.). Mr. Solomon does speak the truth when he stated that MTS "buys its records and tapes at sub-distributor prices or less from all of its vendors." (ER 1451-1452).

Phonodisc: UDC originally allowed the mid-price to petitioners. The retailer defendants herein received the rack price (ER 846-853). Special rebates were also granted (ER 1377). In the summer of 1975, after Phonodisc ceased to distribute Unit-

ed Artists records, petitioners were told that its prices would be raised (ER 1285-1286). The chain stores continued to receive the rack price (ER 1377, 1451-52, 1450, 846-853).

MCA: Mr. Zoslaw had registered complaints to MCA (ER 1387). In the latter part of 1974 the Regional Manager, Mr. Stan Layton, had visited Marin Music Center. Mr. Layton was questioned regarding the price differential that was in effect between retailers. He told Mr. Zoslaw it was wrong for MCA to sell the Zoslaws on a higher price than its competitors, but, he exclaimed (ER 354): "But what can I do about it!"

WEA and other nationwide distributors made it clear to petitioners that they ought to close their store. Petitioners presented the court with an Affidavit of the Advertising Manager of the Strawberry Town and Country Village. Mrs. Zoslaw had invited the WEA Manager, Mr. Perasso, to have lunch with Mr. Rudolph, the adver-

tising Manager. Discussion was to concern shopping center mailers. She had been promised an allowance for the mailer by WEA. Mr. Perasso arrived and then turned to her in the presence of Mr. Rudolph and stated: "I don't have to do business with you -- you're just a pest." Mr. Rudolph declared that he had never seen a representative of a reputable company come to work in the condition he was in and exhibit such a hostile attitude toward his customer (ER 1544-1545).

CBS' Branch Manager told Mrs. Zoslaw if it was up to him, he would cut her off (ER 1407-1408).

MCA's Branch Manager, Jim Fisher informed Mrs. Zoslaw that he simply could not service the account, that he had nine Tower stores to cover, and 11 or 12 accounts, that he should be in the Marin Music Centre every four weeks, but could not make it (Id.).

WEA and Eric-Mainland placed petitioners on hold over any dispute concerning

payment (ER 1390, 253) and Capitol disdained to do any business with the Zoslaws (supra).

G. The Distributor-Defendants' Exclusion of Ethical Retailers Spread to the Entire West Coast and Presumably the Nation.

The files of WEA and MCA expose the exclusion of the independents through the pricing and advertising practice disclosed herein. The WEA files contained a report by Russ Bach, Los Angeles Regional Manager, to Joel Freidman, President of WEA dated August 9, 1974. Mr. Bach reported on conditions at the San Francisco Branch as follows (ER 1382):

> "Rick Galliani reports that most of the small stores in Sacramento have been virtually driven out of business by the Tower Records. Rick is running to a lot of reporting stores to make sure that the Warner Bros. product is getting airplay reports."

MCA's files contain similar statements. The Jim Fisher Sales Manager Weekly Report, San Francisco Market, 3/21/75, stated (ER 1382-83):

"Dealers in the San Jose area are

> extremely upset and worried about the June opening of the new Tower Records store in their area. The smaller dealers in San Jose are currently just getting by and will most likely be completely out of business following the Tower opening. At this time the two Wherehouse stores and the Record Factory in San Jose are getting most of the business."

The elimination of the ethical retailers was shown to have existed on a nationwide basis. The record disclosed that Mr. Joel Freidman, President of WEA, gave the following speech at an assocation meeting of record merchandisers and distributors called NARM in April 1974 (ER 1395, 1485-1493):

> "I don't think we are doing our job too well. Witness the growing number of bankruptcies throughout the nation. Witness the number of retail outlets that are closing their stores, discarding records, phonograph departments, largely as a consequence of their inability to make a reasonable profit.
>
> ***
>
> Rack jobbers, as well as dealers, have the same responsibility not to give their profits away. I take public issue with Russ Solomon and others like him who adopt a policy that says they can only make money by selling for less.

> They can only make money, and continue to make money as long as we, the manufacturers, the distributors, whether independent or otherwise, continue to make it possible for them to do so -- by the extension of unlimited credit, by the extension of unlimited advertising appropriations, by continued over-zealous selling practices, by offering unnecessary discount programs that merely result in returns."

ARGUMENT

Reasons for Granting the Writ

I. The Decision Below is in Total Conflict With the Decisions of This Court Which Prevent Competitive Suppliers From Combining to Establish a Fixed and Rigid Market.

A. This Court's Holdings Preventing Group Action by Those Dominating an Industry Have Been Ignored.

1. Paramount Pictures, Klors, preclude agreements to discriminate.

This is not a case of each distributor supporting a volume discount price sheet based upon separate transactions and openly offered to all. This is a case of alliance and intrigue. The price sheets shown the court below were overtly based on functional classifications. Dealers were charged a distinct price. Those who

performed distribution services to service retailers were to obtain lower prices. What is involved here is precisely the kind of conduct involved in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Schine Chain Theatres, Inc. v. United States , 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Individual transactions, justified by reasonableness in their context, are not involved. Continual discriminatory chain wide deals in which the dominant suppliers in the industry favor and protect the chain, as a group, to the known exclusion of the independents have been proven. When the trial court and the appellate court became aware that the major distributor defendants controlled over 80% of the nations' phonograph records and tapes

had gone to the extent of financing the favored chain retailers, as a group, and had entered into the realm of using the retailers as advertising agents for their product, chosing group advertising rather than individual advertising, the courts were unable to view this case as individual reaction to large mass purchases. The defendant retailers, as respondent distributors must admit, are their financial allies. Distributor financing virtually created the chain retailers through their discriminatory credit term policies, and through their protective refusal to grant equivalent advertising and financing terms to others. Major retailers, The Wherehouse and Tower Records, were shown to have worked together through Capitol to prevent retail price competition in the Los Angeles Area in 1974 on Capitol labels (ER 1073-1074, 1086). Even assuming there was a showing of limited competition, no decision of this Court has ever required a plaintiff

in an antitrust case to prove that an agreement among competitors has ended all conceivable competition; only that an independent class of dealers was being excluded by the agreement. The opinion below unduly examined the relevant market as involving advertised retail price competition among the chain dealers. Indeed, the very showing of such competition as only among the favored in the very geographical area which petitioners operated and in which Capitol expressly disavowed their right to compete raises an exclusionary inference. Such one-sided analysis, it is respectfully submitted, has no place in an action brought by an ethical retailer who has shown an inability to maintain a presence in a market where his buying prices are held up by group action, higher than those charged his unethical retailer competitors. If the advertised selling prices were the result of the chain retailers individual action through the borrowing of funds from an independent

lending institution paying the going rate of interest, there might be an entirely different analysis. But it is these distributors' monies channeled into hands of the mass retailer that paid for those advertisements. Retailers became affiliates of the distributors and they were to be protected. It is clear that Paramount Pictures, supra, allows this action to proceed to trial under alternative theories of liability: (1) Conspiracy to monopolize the distribution of phonograph records and tapes in the United States through the exclusion of small independent distributors and retailers; (2) conspiracy to monopolize the distribution and resale of phonograph records and tapes in the geographical areas of (i) West Coast of the United States; (ii) California; (iii) San Francisco Bay Area; and (iv) San Francisco-Marin County Area; (3) vertical conspiracy between the major distributor defendants and MTS and TEI and Doug Robertson Advertising Agency, (4) injury

arising from the vertical agreements which discriminate against the independent classes of trade and which inevitably spell their exclusion in the affected geographical areas, or any of them, and (5) attempted monopolization of the retailing of records and tapes by MTS.

The court's discussion of proof of intent to monopolize through predatory pricing has no pertinency to the facts at hand. It is well established that parties are presumed to intend the ordinary consequences of their acts (Cal. Evid. Code § 665). Persistent selling of records at $3.69, $3.88 and $3.99 when the cost to the competitor is $3.65, advertised on 307 spots every weekend, is proof of intent. Indeed, Mr. Solomon expressed his intent to utilize the prices to "zing the shit out of competition." (ER 1385-86.) This statement printed in a well read trade magazine gave the distributors knowledge of Mr. Solomon's intended purpose. Continual subsidizing of this operation was

with knowledge of his intent.

The major distributors involved here have decreed that the buying public can only rationally purchase: (a) at stores which heavily stock the product that they distribute; (b) with knowledge of current releases received only through the chosen retailers which are supplied with their advertising funds; (c) at prices the group choses to sell.

The concept of predatory pricing based upon marginal costs might have application to a manufacturer in control of his own costs, but certainly can have no application in this case where the major costs are in products being resold. That price, in turn, is the object of an agreement to sell at greatly advantageous prices and terms. To allow a retailer who enters into such special allowance arrangements to escape liability on the grounds that he is selling above his costs is certainly not persuasive. It favors and protects expressly that which Congress outlaws. At

the very least, petitioners have uncovered a conspiracy of large proportions to violate the Robinson-Patman Act. That conspiracy is actionable as a Section 1 or Section 2 Sherman Act violation. Such a conspiracy on the scale shown here is violative of Section 2 of the Sherman Act. It is sufficient to support a specific evidentiary showing of intent. See United States v. New York Great Atlantic and Pacific Tea Co., 173 F.2d 79 (7th Cir. 1949), affirming, 67 F. Supp. 626. Petitioners have been told that they must overcome the inference of individual action because of the business desire for increased sales to the major chain stores. But there must first be an overall view of the evidence in terms of protection of antitrust rights and obligation to obey the law. The issues of intent, commitment, and participation in light of the evidence of purpose and effect here cannot be decided in summary judgment. Competitive units may not agree

to achieve volume sales by the exclusion of a class of independents. Clearly, the significance of meetings between the credit manager of these nationwide distributors is to be decided only by giving all favorable inferences to petitioners. The meetings involve exchange of information and the discussion of terms of credit which have been granted to favored retailers. This is unlike Cement Manufacturers Protective Association v. United States, 268 U.S. 588 (1925). These meetings concern specific discussion of the specific terms used to finance the chain retailers. They involve disclosure of the intended discriminatory terms (ER 1402-1405, 1511).

The specific function of the Credit Manager Meetings is to support heavy financial assistance to the chain retailer. The matter of definition is important. It is said that there is no exchange of pricing information. Yet the Ninth Circuit has recently held that the

extension of credit is an attribute of price. D&S Redi Mix v. Sierra Redi Mix and Contracting, 1982-83 Trade Cases, ¶ 65,017 (9th Cir. 1982). Further it appears erroneous to heed Catalano v. Target Sales, Inc., 446 U.S. 643 (1980) to the effect that an agreement to fix credit terms is an illegal price fix but to ignore circumstantial evidence that such is precisely what is going on.

The court's discussion as to vertical conspiracy is out of context with the facts. The evidence of the favored retailers' low pricing both at promotional prices and at shelf prices (ER 1385-1386, 2041, 2045-2104) is conclusive on the factual showing which meets the statement of law calling for such effect. A term of the unlawful agreement here is that the chain retailers will advertise at the stated prices. Assuming that the pricing is below cost of the small retailers, because of the group fixed prices the record cannot be analyzed in terms of the

Zoslaws alone. The small retailers obtained the same price category as did the Zoslaws. The evidence showed the exclusion of petitioners under circumstances applicable to an entire class. Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69 (1979) demonstrates the distinction involved in petitioners showing from that of an ordinary Robinson-Patman Act case. This record does not show isolated transactions but persistent continual discrimination. The meeting competition defense does not apply to a classification system or widespread discriminatory practice. Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945); FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945); FTC v. Cement Institute, 333 U.S. 683 (1948); FTC v. National Lead Co., 352 U.S. 419 (1957). Further, the respondents did precisely what they were not to do under Great Atlantic & Pacific Tea Co., supra; United States v. U.S. Gypsum Co., 438 U.S. 422 (1978); industry members of an oligopolistic industry may not contact each

other to obtain pricing information.

B. The Determination That a Refusal to Deal Based Upon Reaction to an Antitrust Complaint is Lawful is in Conflict With the Decision of Another Panel of the Ninth Circuit, and the Third Circuit.

Ostrofe v. H.S. Crocker, 670 F.2d 1378 (9th Cir. 1982); Bergen Drug Co. v. Parke, Davis and Co., 307 F.2d 725 (3rd Cir. 1962) are in conflict with the instant decision. See, also, Program Engineering, Inc. v. Triangle Publications, 634 F.2d 1188 (9th Cir. 1980). The public policy factors outlined by Judge Browning in Ostrofe, supra, are fully applicable to Capitol Records. Capitol enters into exclusive performance contracts, obtains the protection of the copyright laws and subsidizes the advertising of its exclusive performances. Certainly it is no great burden for the law to decree that those who utilize the protections which society grants cannot refuse to deal when its marketing decisions are deemed to be violations of the antitrust laws. It has

always been thought that the enforcement of antitrust laws is of overriding importance. The common law policy of estoppel has been held inapplicable for the specific purpose of allowing adjudication of antitrust issues for the general protection. This history of curtailment of common law doctrines to make certain that restraints of trade are litigated has not been applied here. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942). Morton Salt Co. v. G.S. Suppiger, 314 U.S. 488 (1942); Lear, Inc. v. Adkins, 395 U.S. 653 (1969). Further, Capitol has been shown to be involved in a conspiracy to establish a fixed and rigid system of distribution in the retailing of phonograph records and tapes. The learned court's use of the small quantities of purchase by the Zoslaws is erroneous. A court can hardly point to a victim's smaller purchases of products when it has seen a deliberate course of conduct by Capitol and its co-conspirators which

prevents volume purchasing. This Court is faced with a lower court giving sanction to the successful means used by Capitol in driving petitioners out of business. By reason of congressional intent, as expressed in the antitrust statutes, such a viewpoint cannot prevail.

On its face, the decision ignores the fact that the refusal to deal supports a Robinson-Patman violation which the decision allows to go forward. A refusal to accord proportionately equal treatment to an established customer may be a violation of the provisions of Sections 2(d), 2(e) of the Clayton Act. Corn Products Refining Co. v. F.T.C., 324 U.S. 726, 743-744 (1945); American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919 (5th Cir. 1951).

C. Interstate Circuit Has Been Erroneously Construed to Allow Determinations of Fact by Appellate Courts

In the Interstate Circuit case, supra, this Court determined that the "combination or conspiracy" provisions of the

Sherman Act prevent persons from accepting an invitation to participate in a plan, the necessary consequences of which, if carried out, is in restraint of interstate commerce. In 1962 this court held in Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) that summary judgment was inappropriate in Sherman Act conspiracy cases. The thrust of the doctrine of conscious parallelism has now been reversed.

It is respectfully submitted that the learned court of appeals has erroneously allowed trial courts to weigh the evidence, to determine the issue of the credibility of the witnesses and to allow, not an overall view of the plan, and the necessary consequences of the plan, viewed as a whole. Further, it is held that victims of alleged conspiratorial conduct must establish a plausible motive for the plan. The decision of this Court, is cited for support; First National Bank of Arizona v. Cities Service Co., 391 U.S.

253 (1968). Cities Service, to the contrary, establishes that when alleged conspirators move for summary judgment in a conspiracy case, they must conclusively establish that the facts cannot conceivably, under any theory, support the allegations of conspiracy. In reality, Rule 56 is now being utilized to determine not whether there are issues of fact, but what the facts are.

It is respectfully submitted that the United States Constitution prevents the courts from weighing the substantial evidence. F. R. Civ. P. 56 does not, and cannot, allow a departure from the Constitutional prohibitions against court fact weighing in jury cases. U.S. CONST. art. I, III, amend. VII. Beacon Theatres v. Westover, 359 U.S. 500 (1959), In Re U.S. Financial Securities Litigation, 609 F.2d 411 (9th Cir. 1979). Petitioners demanded a trial by jury. As seen above, there was a showing of uniformity in list prices, uniformity in the granting of sub-distributor prices to the named retailers,

uniformity in the subsidization of retailer-defendants, and uniformity in the disallowance of meeting competition on behalf of the small retailer. That the effect of the advertised prices would result in the elimination of the small retailers was undisputably shown to have been known to each of the distributor-defendants. It was the price which each specified to be advertised that was carried over the media. The elimination of a class of dealers is a restraint of trade. This case should proceed to a jury trial on the conspiracy issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated February 18, 1983, San Francisco, California.

Respectfully submitted

Maxwell Keith
Attorney for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES ZOSLAW AND JANE ZOSLAW, husband and wife, dba MARIN MUSIC CENTRE,	)	Nos. 80-4330 80-4429
Plaintiff-Appellants,	)	
vs.	)	OPINION
MCA DISTRIBUTING CORPORATION, DOUG ROBERTSON ADVERTISING, INC., MTS, INC., TOWER ENTERPRISES, INC., WARNER/ELEKTRA/ATLANTIC CORPORATION, ABC RECORDS, INC., POLYGRAM DISTRIBUTION, INC., CAPITOL RECORDS, INC. and CAPITOL INDUSTRIES-EMI,	)	
Defendants-Appellees.	)	

Appeal from the United States
District Court for the Northern
District of California
Honorable Robert F. Peckham,
Chief Judge, Presiding
Argued and Submitted
November 9, 1981

Before: BAZELON,* SKOPIL and POOLE, Circuit Judges POOLE, Circuit Judge:

*The Honorable David L. Bazelon, Senior Judge for the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

This is an appeal by Charles and Jane Zoslaw, the former owners of a retail record store, from a series of orders entered by the district court granting summary judgment in favor of appellee record distributors: Warner/Elektra/ Atlantic Corporation (WEA); MCA Distributing Corporation (MCA), Polygram Distribution Inc. (Polygram)[1/], ABC Records, Inc. (ABC) and Capitol Records, Inc. and its parent corporation, Capitol Industries-EMI (jointly, Capitol), appellee retailer, MTS, Inc. (MTS)[2/] and appellee Doug Robertson Advertising, Inc. (Doug Robertson). In this appeal the Zoslaws claim that the district court erred in finding that they had failed to satisfy the "in commerce" jurisdictional requirement of the Robinson-Patman Price Descrimination Act, and in concluding that they had failed to raise an issue of material fact concerning their claims under sections 1 and 2 of the Sherman Antitrust Act. We reverse the district court's

ruling as to the Robinson-Patman claims except as to Doug Robertson and affirm as to the Sherman Act claims.

I. STATEMENT OF CASE

Appellants operated Marin Music Centre, a Mill Valley retail store which sold phonograph records and equipment, prerecorded tapes and related merchandise. They experienced startup losses in 1965 an 1966 and then claimed to have operated at a profit for the following two years. After that period, the store encountered financial difficulties from which it never recovered, suffering losses from at least 1971 until it went out of business in 1977.

The district court found that during the time the Zoslaws were in business the Marin County record market "changed dramatically." 533 F. Supp. 540, 546 (N.D. Cal. 1980). Several other retail record and tape stores opened in the area and the number of department stores, grocery stores and drug stores with record depart-

ments also increased. Charles Zoslaw readily admitted that the store suffered losses because other stores sold records at lower prices.

In January, 1975, appellants filed this action. They subsequently filed three amended complaints adding various defendants and factual contentions. As thus amended the complaint named all of the appellee record distributors: WEA, MCA, Polygram, Capitol and ABC. Several other named distributors, who subsequently settled with appellants, were CBS, Inc., RCA, Inc., Eric-Mainland Distributing Company, United Artists Music and Record Group, Inc. (UAMARGI) and Transamerica Company, the parent corporation of Eric-Mainland and UAMARGI. Appellants alleged that the distributor defendants violated section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), by selling records and tapes to retail chain stores at lower prices than those offered to single stores, such as Marin Music Centre, and

that the distributors violated sections 2(d) and 2(e) of the Act, 15 U.S.C. §§ 13(d) and 13(e), by discriminating in favor of retail chain stores in granting promotional allowances and furnishing special services. They also alleged that the distributor defendants conspired among themselves and with the retailer defendants to favor the retail chain stores at the expense of individual stores in violation of section 12 of the Sherman Act, 15 U.S.C. § 1.

Three retailers were named defendants: MTS, Integrity Entertainment Corporation (IEC), and CBS, Inc., doing business as Discount Records. The latter two subsequently settled. Also named defendant was Doug Robertson Advertising Agency, with which Tower did business. Appellants alleged that the retailers violated sections 2(d), 2(e), and 2(f), by knowingly inducing and receiving the alleged discriminations in price and other terms, allowances and services. The retailer

defendants were also charged with violating section 1 of the Sherman Act by conspiring with the distributors to receive favorable treatment. Finally, appellants accused MTS with monopolizing or attempting to monopolize the retail record market in violation of section 2 of the Sherman Act.

In the two years after appellants instituted the action, four distributor defendants moved for partial summary judgment on the ground that the court lacked jurisdiction under Robinson-Patman because the allegedly discriminatory sales were not "in commerce" as required by that Act. The district court granted each of these motions: in favor of WEA on June 21, 1976, see Zoslaw v. Columbia Broadcasting System, 1977-1 Trade Reg. Rep. (CCH) ¶ 61,756; in favor of Eric-Mainland on July 20, 1976; in favor of CBS on April 18, 1977; and in favor of Polygram (limited to the period 1974 and 1976) on August 17, 1977.[3/]

In October, 1977, appellants filed a motion for preliminary injunction to prevent the defendant distributors from favoring chain store retailers and to prevent the defendant retailers from accepting such preferences. The motion also sought to prohibit Capitol Records from refusing to sell phonograph records, tapes and cassettes to Marin Music Centre. This claim arose when Capitol, shortly after settling with the appellants, ceased selling merchandise to them. Appellants then amended their complaint to reinstate Capitol as a defendant based on its refusal to deal. The district court denied the motion, finding that appellants had failed to demonstrate a likelihood of success on the merits or a showing of irreparable injury.

In September, 1978, the district court granted Capitol's motion for summary judgment on the refusal to deal claim, finding that Capitol had legitimate business reasons for its action.[4/] Three of the four

remaining distributor defendants, WEA, MCA, and Polygram, as well as MTS and Doug Robertson, then moved for summary judgment on all of the remaining claims against them. In January, 1980, the court granted all of the defendants' pending motions. In its opinion, the district court, held, first, that appellants failed to produce competent evidence to support their factual allegation. The court noted that the appellants' opposition papers "regularly and systematically" violated Rule 56 of the Federal Rules of Civil Procedure as well as Rule 220-8 of the Local Rules of the Northern District of California. The court observed that most of the documents submitted by appellants with their opposition lacked authentication and that they often failed to support the factual inference for which they had been provided.

The court then ruled that even if appellants had properly supported their factual allegation, summary judgment was still appropriate since they had failed to

advance an adequate legal theory of the case. The remaining Robinson-Patman claims were dismissed against two of the distributor defendants, MCA and Polygram, on the finding that appellants had failed to satisfy the "in commerce" requirement of the Act. The court also held that it lacked jurisdiction over appellants' Robinson-Patman claims against MTS and Doug Robertson because the Supreme Court's decision in Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69 (1979), precluded jurisdiction under section 2(f) and that there was no private right of action against buyers under sections 2(d) and 2(e).

As for the Sherman Act, section 1 claims, the court found no basis in the material submitted by appellants to support any of the claims of conspiracies to restrain trade alleged by appellants, and found no reasonable factual inference in support of appellants' monopolization and

attempted monopolization claims against MTS.

In May, 1980, the last remaining defendant, ABC, filed its motion for summary judgment of both the Robinson-Patman and Sherman Act claims. The district court granted this motion and entered judgment in favor of all of the defendants in June, 1980.[5/]

Appellants challenge the district court's findings that the allegedly discriminatory sales were not "in commerce" as required by Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974), and therefore not within section 2(a) of the Robinson-Patman Act. Alternatively, they contend that even if section 2(a) is inapplicable, the court still had jurisdiction over the distributor defendants under sections 2(d) and 2(e), and over MTS and Doug Robertson under section 2(f). As for the Sherman Act, appellants claim that the district court erred in finding no genuine issue of material fact concerning the

existence of a conspiracy among distributors and retailers to favor certain chain retailers. They also contend that the district court erred in finding no evidentiary support for their claim that MTS attempted to monopolize trade. Finally, appellants contend that the district court ignored disputed factual issues when it concluded on motion for summary judgment that Capitol's refusal to deal was a unilateral act made for legitimate business reasons.

II. ROBINSON-PATMAN JURISDICTION

A. The Distributor Appellees

Although the district court issued several opinions in granting summary judgment on the Robinson-Patman claims involving the distributor appellees, the relevant facts regarding the sales by each appellee can be briefly summarized.

Two of the distributor appellees, WEA and Polygram are wholly owned subsidiaries of corporations engaged in record and tape production.[6/] During the relevant period

the other two appellees, ABC and MCA, manufactured and distributed records and tapes nationwide.[7] Each distributor maintained a regional warehouse in California which supplied records and tapes for stores in the San Francisco Bay Area, including MTS and Marin Music Centre. Depending on the distributor involved, each of the warehouses received a varying percentage of records and tapes which were manufactured out of state. For example, WEA's California warehouse received approximately 10% of its records and tapes from out of state, while Polygram's warehouse received approximately 15% of its goods from out of state.[8]

In certain instances, each distibutor made "drop shipments" to Bay Area retail record stores. A drop shipment occurred when the distributor's California warehouse was unable to fill an order from a retail store. In that case the distributor would order the out of state manufacturing plant to send a shipment of

records or tapes directly to the local retailer. Drop shipments occurred infrequently. For example, MCA calculated its cumulative percentage of dollar sales to the San Francisco Bay Area attributable to drop shipments at 0.44%.

To prove justification under section 2(a) of the Robinson-Patman Act, a plaintiff must demonstrate: (1) that the defendant is "engaged in interstate commerce;" (2) that the price discrimination occurred "in the course of such commerce;" and (3) that "either or any of the purchases involved in such discrimination are in commerce." William Ingliss & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1043 (9th Cir. 1981).[9/]

In Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974), the Supreme Court concluded that the jurisdictional "in commerce" language in section 2(a) is not as broad as the "affecting commerce" language in the Sherman Antitrust Act. In

particular, the court interpreted the "purchases . . . in commerce" requirement as limiting the section's application to cases "where 'at least one of the two transactions which, when compared generate a discrimination . . . cross[es] a state line.'" 419 U.S. at 200 (quoting Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 9 (5th Cir.), cert. denied, 396 U.S. 901 (1969)). See Ingliss, 668 F.2d at 1043.

The district court, in applying Gulf Oil, concluded that the sales by the distributor appellees were not "in commerce" and that the drop sales were de minimis and therefore would not support jurisdiction under section 2(a). Appellants challenge both of these rulings.

1. Were the Record and Tape Sales to Bay Area Stores "In Commerce?"

In examining the interstate sales, the district court recognized that if goods from out of state are still within the "practical, economic continuity" of the

interstate transaction at the time of the intrastate sale, the latter sale is considered "in commerce" for purposes of the Robinson-Patman Act. See Hampton v. Graff Vending Co., 516 F.2d 100, 102 (5th Cir. 1975) (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. at 195). In determining whether the sales of records here were therefore in the flow of commerce the court relied on the traditional intent test derived from the Fair Labor Standards Act, and subsequently applied in Robinson-Patman cases.[10/] See Walling v. Jacksonville Paper Co., 317 U.S. 564, 570 (1942); Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588, 590 (5th Cir.), cert. denied, 396 U.S. 1042 (1969); Food Basket, Inc. v. Albertson's Inc., 383 F.2d 785 (10th Cir. 1967); 4 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 26.02[3] (1969 & Supp. 1981).

Under this approach, the flow of commerce ends when goods reach their "intended" destination. Von Kalinowski, supra.

In gauging the point of destination courts consider whether goods coming from out of state respond to a particular customer's order or anticipated needs. Walling, 317 U.S. at 567-70. If so, the sales meet the "in commerce" requirement even though the goods may be stored in a warehouse before actual sale to the buyer.[11/] Walling, 317 U.S. at 570; Hampton, 516 F.2d at 102-03. However, goods leave the stream of commerce when they are stored in a warehouse or storage facility for general inventory purposes, that is, with no particular customer's needs in mind. Hampton, 516 F.2d at 103; Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, (5th Cir. 1969).

In Walker Oil, 414 F.2d at 588, for example, the plaintiff service station owner charged the defendant, Judson Oil, with selling gasoline at a different price at its Florida station than at its Alabama station. Hudson purchased gasoline for the two stations from a supplier in

Mobile, Alabama. The Fifth Circuit concluded that since Hudson's purchases from the Alabama supplier for its Florida station were not based on specific needs of retail customers of the service station, the flow of commerce ended when the gasoline was delivered to the station.

The district court here determined from affidavits submitted by appellees that the latter stocked their California warehouses for general inventory purposes depending on a record's anticipated performance, and did not order records for particular customers. That conclusion is supported by the record, and appellants do not offer serious dispute. Based on this finding, the court held that the subsequent sales to Bay Area retailers were not in the flow of commerce.

This emphasis on intended destination as a key to the statute's coverage has been criticized by some commentators as providing a means by which interstate producers may avoid Robinson-Patman liabi-

lity by setting up local storage facilities in the secondary states. See 1 P. Areeda & Turner, Antitrust Law ¶ 233(b) (1978); ABA Antitrust Section, The Robinson-Patman Act: Policy and Law 44-45 (1980). On the contrary, the cases relied on by the district court and cited by appellees primarily involve sales by out of state producers to distributors or retailers who then resell the goods intrastate at the allegedly discriminatory price. See, e.g., Walling, 317 U.S. at 564; Food Basket, 383 F.2d at 785; Hampton, 516 F.2d at 100. In such cases the analysis of intent is useful in determining whether the initial sale from the out of state producer bears sufficient relationship to the subsequent allegedly discriminatory sale to conclude that the latter sale, is part of a continuous interstate transaction and hence in commerce. See P. Areeda & D. Turner, supra. Conversely, where a producer simply moves goods manufactured out of state

into the state and resells at the allegedly discriminatory price, there is no intermediate sale to break the flow of commerce. And indeed, it would seem that Standard Oil Co. v. FTC, 340 U.S. 231 (1951), in which the Supreme Court held that in state storage of gasoline by an interstate oil producer did not end the flow of commerce, imposes some limit upon the application of the intent rule.

In Standard Oil, the defendant, accused of discriminating in selling oil to Michigan jobbers, refined the oil out of state and then shipped it to its own storage facilities in Michigan from which delivery was made to customers upon individual orders. Although the gasoline rested up to several months in the storage facility, the court held that it remained part of the flow of commerce:

> Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small concerns. Such temporary storage of the gasoline

> as occurs . . . does not deprive the gasoline of its interstate character.

340 U.S. at 237-38 (citations omitted). Moreover, the Court specifically distinguished the early Fair Labor Standard Act cases, including Walling, noting that in those cases "interstate commerce ceased on delivery to a local distributor," while "the sales involved here are those of an interstate producer and refiner to a local distributor." 340 U.S. at 238 n.6.

We interpret Standard Oil to indicate that interstate producers of goods produced out of state do not meaningfully interrupt the flow of commerce by simply storing them in the state of eventual sale. Viewed in this light we think the district court prematurely granted summary judgment to the appellee distributors. In particular, the declarations and answers to interrogatories submitted by ABC and MCA indicate that both manufactured records and tapes outside of California, which were then placed in California ware-

houses for eventual sale to retailers. Those actions were not alone sufficient to remove the goods from the stream of commerce.

WEA and Polygram did not themselves manufacture records, but they were wholly owned subsidiaries of companies engaged in record and tape production. Sales to subsidiaries in such instances do not necessarily remove such transactions from Robinson-Patman jurisdiction. See Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969) ("We find no basis for immunizing Standard's price discrimination simply because the product in question passed through an additional formal exchange before reaching the level of Perkin's actual competitor"). Similarly, "passage of title or the terms of shipment, although relevant, do not control." Hasbrouck v. Texaco, Inc., 663 F.2d 930, 934 (9th Cir. 1981); S & M Materials Co. v. Southern Stone Co., 612 F.2d 198, 200

(5th Cir.), cert. denied, 449 U.S. 832 (1980).

Therefore, as to the record and tape sales by the parent corporations to the WEA and Polygram warehouses in California, we examine the extent to which the subsidiaries acted as independent distributors in their pricing and marketing decisions, in effect, breaking the flow of commerce between the manufacturer and the local retailer. See United States v. American Building Maintenance Industries, 422 U.S. 271, 285 (1975);[12/] P. Areeda & D. Turner, supra, at ¶ 233(b). Such threshold issues of jurisdiction are normally questions of fact for the jury to resolve. Hasbrouck, 663 F.2d at 933. Since the district court did not consider these controlling principles and it appears that there are genuine issues of material fact in dispute regarding their resolution the grants of summary judgment in favor of WEA and Polygram were improper.

2. De minimis interstate drop sales.

After finding the sales to Bay Area retailers from the distributors' California warehouses not "in commerce," the district court considered the impact of the interstate drop sales. It held the sales so "scattered an insignificant" that they insufficiently support a Robinson-Patman Act claim. We have ruled that summary judgment was improperly granted as to the sales from the warehouses but to avoid uncertainty on remand, it should be stated that in our view the district court correctly excluded the drop sales as a basis for jurisdiction.

The principle of de minimis is usually appropriate in the light of a finding going to the substance of the action itself that a claimed price discrimination did not "substantially lessen" competition as required by the statute. See e.g., Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220 (5th Cir. 1973), cert. denied, 414 U.S. 1136 (1974). How-

ever, in several instances courts have made de minimis findings regarding jurisdiction under the Act. Thus in Food Basket, 383 F.2d 785, the court found that certain "drop-sales" of goods from out of state suppliers to a grocery chain were not sufficient to bring the chain under the Act where it received all of its other goods from warehouses located in the state. Accord Skinner v. United States Steel Corp., 233 F.2d 762 (5th Cir. 1956); Baldwin Hills Building Material Co. v. Fibreboard Paper Products Corp., 283 F. Supp. 202 (C.D. Cal. 1968). But see Von Kalinowski, supra, at § 26.01[2] (criticizing use of the de minimis test for jurisdictional purposes).

Since the district court's decision in this case, we have had occasion to rule on the applicability of the de minimis rule to jurisdictional challenges under the Robinson-Patman Act. In William Inglis, 688 F.2d 1014, the defendant bakery located in California marketed its bread

primarily in state. However, it also made sales to accounts in Nevada. We rejected the contention that the Nevada sales were de minimis and therefore insufficient to invoke jurisdiction. While recognizing that interstate sales which were merely "inadvertent or incidental" to a pattern of intrastate sales might justify application of a de minimis rule, 668 F.2d at 1044 n. 54, 23 concluded that the sales involved were part of a multi-state marketing operation and therefore not de minimis. Id.[13/]

In contrast the drop sales here were not part of the normal marketing or distribution pattern of the distributors, which, instead focused on supplying Bay Area stores from California warehouses. Drop sales occurred when there were gaps in that distribution system. Given their relative size and sporadic nature the sales appear as an anomaly in the normal distribution pattern. See Food Basket, 383 F.2d at 788. We therefore determine

that the circumstances here involve the narrow category in which application of de minimis principles to jurisdictional questions is appropriate.

3. Jurisdiction under Sections 2(d) and 2 (e) of the Robinson-Patman Act.

Appellants contend that even if section 2(a) does not apply to the distributor appellees, sections 2(d) and 2(e) apply because the jurisdictional test for those sections is more liberal than the standard under section 2(a).[14/] Again, while we reverse the summary judgment that there was no jurisdiction under section 2(a), we conclude that the court correctly held that the jurisdictional reach of sections 2(d) and 2(e) goes no further than section 2(a).

Section 2(d) relates to payments for services or facilities and requires that the seller be "engaged in commerce" and that the payment or benefit be "in the course of such commerce." Section 2(e) covers the furnishing of services or faci-

lities for processing and handling and contains no "in commerce" language. However, it has been held that the omission of such language was inadvertent. See Elizabeth Arden, Inc. v. FTC, 156 F.2d 132, 134 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947). Neither section contains language as does section 2(a), referring to "purchases . . . in commerce." Appellants therefore argue that those sections are not limited by the requirement that there be an interstate sale.

Sections 2(d) and 2(e) of the Robinson-Patman Act were enacted to prevent sellers from circumventing section 2(a) by discriminating between buyers in respects other than price. See FTC v. Simplicity Pattern Co., 360 U.S. 55, 68-69 (1959). It would therefore be incongruous to hold as appellants suggest, that those sections go beyond the coverage of section 2(a). See W. Patman, Complete Guide to the Robinson-Patman Act 132 (1963); F. Rowe, Price Discrimination Under the

Robinson-Patman Act 393 (1962). There are decisions to the contrary, see American Macaroni Manufacturing Co. v. FTC, 321 F.2d 404, 408 (5th Cir. 1963), cert. denied, 375 U.S. 971 (1964), but in general cases have concluded that sections 2(d) and 2(e) have the same jurisdictional limitation as section 2(a). See L & L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113, 1116 (5th Cir. 1982); Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949); R. S. E., Inc. v. Pennsy Supply, Inc., 489 F. Supp. 1227, 1236 (M.D. Penn. 1980), Rohrer v. Sears, Roebuck & Co., 1975-1 Trade Reg. Rep. (CCH) ¶ 60,302 (C.D. Mich. 1975).

B. The Retailer Appellee - MTS

Section 2(f) of the Robinson-Patman Act makes it unlawful for a buyer "engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." (Emphasis added). In Great Atlantic & Pacific Tea

Co., 440 U.S. at 69 (1979), the Supreme Court held that a buyer does not violate section 2(f) in receiving a discrimination in price unless the discrimination is unlawful under section 2(a).

The district court, relying on Great Atlantic & Pacific Tea Co., correctly ruled that since the sales by distributors failed to meet the "in commerce" requirement of section 2(a), MTS could not be liable under section 2(f) for receiving the allegedly discriminatory prices. However, since we reverse the court's grant of summary judgment as to the section 2(a) claims, we also reverse the ruling against the section 2(f) claim for further consideration in the light of this opinion.[15/]

C. The Appellee Advertiser-Doug Robertson

The district court found no "factual or legal basis upon which plaintiffs hope to hold Doug Robertson Advertising Agency liable." 533 F. Supp. at 551. We

agree. Doug Robertson handled MTS advertising. The uncontested declaration submitted by it indicates that the only other connection between the two appellees was that Doug Robertson owned 5% of several MTS subsidiary corporations. It is therefore clear that Doug Robertson did nothing to violate sections 2(a), 2(d) or 2(e) of the Robinson-Patman Act by providing discriminatory prices, promotional or other services to record retailers. Similiarly, it received no price discrimination from the record distributors. Accordingly, given the absence of any justiciable claim against it, the district court correctly granted summary judgment to Doug Robertson on the Robinson-Patman claims.

III. THE SHERMAN ACT CLAIMS

The district court granted summary judgment in favor of appellees on all of appellants' claims under the Sherman Antitrust Act. We are admonished by the Supreme Court to proceed with caution inconsidering summary judgment in anti-

trust cases. Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962). See Program Engineering v. Triangle Publications, 634 F.2d 1188, 1192 (9th Cir. 1980); Ron Tonkin Gran Turismo v. Fiat Distributors, 637 F.2d 1376, 1381 (9th Cir. 1981), cert. denied, 102 S.Ct. 128 (1981). However, the Court has also indicated that clever pleading does not entitle an antitrust claimant to a trial with no regard for Rule 56 of the Federal Rules of Civil Procedure. First National Bank of Arizona v. Cities Service, Co., 391 U.S. 253, 289-90 (1968). See Ron Tonkin, 637 F.2d at 1381; Betaseed, Inc. v. U and I Inc., 681 F.2d 1203, 1207-08 (9th Cir. 1982).

Under Rule 56, summary judgment is appropriate "where the record before the court on the motion reveals the absence of any material issue of fact and [where] the moving party is entitled to judgment as a matter of law." Portland Retail Druggists Association v. Kaiser Foundation Health

Plan, 662 F.2d 641, 645 (9th Cir. 1981). The burden of demonstrating the absence of an issue of material fact lies with the moving party. British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978), cert. denied, 441 U.S. 968 (1979). The opposing party must then "present specific facts demonstrating that there is a factual dispute about a material issue." Program Engineering, 634 F.2d at 1193; British Airways, 585 F.2d at 951.

In this case, the district court found that the appellees carried their burden in demonstrating the absence of a genuine issue of material fact. It ruled, however, that the opposition materials submitted by appellants did not comply with the requirements of Rule 56(e) Fed. R. Civ. P. or Rule 220-8 of the Local Rules of the Northern District of California. The court therefore found that appellants failed to present competent evidence to dispute appellees' showing.[16]

Our review of the record amply confirms the district court's finding. In the main, appellants sought to oppose the summary judgment motions by introducing literally hundreds of pages of documents purporting in their cumulative effect to show the existence of a genuine issue of material fact. To meet the requirements of Rule 56 as supplemented by the Local Rules of the district court, such materials are required to be authenticated by affidavits or declarations of persons with personal knowledge through whom they could be introduced at trial. See United States v. Dibble, 429 F.2d 598, 602 (9th Cir. 1970) (writings are not admissible under motion for summary judgment without proper foundation); California Pacific Bank v. Small Business Administration, 557 F.2d 218, 222 (9th Cir. 1977). As the district court observed, most of the documents lacked any authentication whatsoever. Moreover, appellants made virtually no effort to organize the documents in a

reasonably intelligible manner. In many particulars, entire correspondence files or sets of records were included with no attempt to sort out or identify that material which was relevant.

A party may not prevail in opposing a motion for summary judgment by simply overwhelming the documentation. (The district court characterized it as "ersatz evidence.") But even were that organizational prerequisite satisfied, we would be compelled to hold that the materials offered did not, even viewed in the light most favorable to appellants, give rise to a genuine issue of material fact sufficient to prevent a motion for summary judgment. See Cities Services, 391 U.S. at 253; British Airways, 585 F.2d at 951-52.

A. The Section 1 Conspiracy Claims

As the district court stated, appellants' Sherman Act allegations come through as an attempt to breath new life into their Robinson-Patman claims by re-

casting them in the form of a conspiracy of which appellants suggest two possibilities. The first is an overall conspiracy among the record distributors and chain retailers to favor the latter group at the expense of small record retailers.[17/] The second sugestion is of a vertical conspiracy to restrain competition between each distributor and each chain store retailer.

1. The Horizontal Conspiracy

Appellants claim error by the district court in granting summary judgment on the basis that there was no genuine issue of material fact regarding the existence of an overall conspiracy. We have repeatedly articulated the test for granting summary judgment in antitrust conspiracy cases:

> Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendants becomes proper.

ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52, 55 (9th Cir. 1975); Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977). In this case, since the appellees' affidavits all denied any conspiracy with the others, and since appellants presented no direct evidence of conspiracy, appellants' only chance depended on their presentation of circumstantial evidence sufficient to support the inference of a "conscious parallelism" conspiracy theory and on such further inferences as appellants might be able to draw from trade association and credit managers' meetings among the various distributors.

a. Conscious Parallelism

In proof of the hypothesis of consciously parallel business behavior, appellants point to the distributors' use of similar account classifications, pricing structures and promotional policies. However, as the district court determined, appellants failed to make a proper showing

of sufficiently similar conduct in such matters. See Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 661 (9th Cir.), cert. denied, 375 U.S. 922 (1963). Instead, appellees successfully demonstrated considerable variation in the distributors' account classification systems as well as variance in prices offered to retailers by distributors. Moreover, each distributor offered its own package of promotional offers and discounts which, in fact, substantially encouraged competition in the record business.

Yet, even if appellants had successfully demonstrated that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment. See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41 (1954); Syufy Enterprises v. National General Theatres Inc., 575 F.2d 233, 236

(9th Cir. 1978); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971). The appellees presented sufficient evidence of legitimate business decisions to justify their actions. For example, WEA justified its two-tier account classification system between "subdistributors" and "retailers" as a means of meeting the competition of those distributors who had previously entered the market and who maintained multiple-tier account classification. In addition, it presented evidence that the lower subdistributor price reflected cost savings to WEA because subdistributors had a centralized location for purchases, billings, returns and deliveries and subdistributors made box-lot purchases of the same records.

Certain distributors did give to chain store retailers discounts in addition to those to which they were entitled under their account classification systems. For example, WEA apparently gave MTS a subdistributor price in 1975 even though MTS

did not meet WEA's technical definition of a subdistributor. However, appellants' own evidence indicated that the distributors did so because of claims by the large retailers that they were receiving lower prices from the distributors' competitors and that failure to reduce price would adversely affect the retailers' merchandising of the distributor's records. Such evidence does not indicate a conspiracy to favor large record stores. In fact, the Sherman Act is intended to encourage such competition between sellers. See Great Atlantic & Pacific Tea Co., 440 U.S. at 83 n.16.

Finally, appellants' conscious parallelism claim is deficient because it never established a plausible motivation for the conspirators' conduct. In Cities Service the court found the plaintiff's conspiracy theory to be inadequate where the interests of the alleged conspirators were divergent. In the absence of any common motivation, the court concluded, there

existed no grounds for inferring a conspiracy. 391 U.S. at 287. Accord Venzie Corp. v. United States Mineral Products Co., 521 F.2d 1309, 1314 (3d Cir. 1975). Here, appellants are unable to advance any plausible reason why the major record distributors would conspire to favor certain retailers, thus limiting the retail outlets for their own products. Appellants' theory of conspiracy would increase the bargaining power of the major chain stores against the distributors themselves. Indeed, the statements of Joel Friedman, of WEA, which appellants attempted to introduce into evidence, indicates that WEA viewed the buying and marketing practices of chain store retailers as a threat to the distributors. In sum, aside from the most conclusory allegations, appellants have made no attempt to show why it should be held to have been in the interest of the record distributors to engage in conspiracy the result of which

would be lowering of prices offered to their largest customers.[18/]

b. Distributors meetings and discussions

Aside fronm their conscious parallelism theory, appellants also attempt to prove the existence of a conspiracy on the basis of trade association meetings and exchanges of credit information among distributors. They contend that the participation of distributors at meetings of the National Association of Record Manufacturers (NARM) evidences a "cartel." However, in the absence of any indication of agreement or consent to an illegal arrangement, evidence of industry meetings is not sufficient to prove a conspiracy. Maple Flooring Manufacturers Association v. United States, 268 U.S. 563, 575 (1925); Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977). Moreover, appellants presented no evidence that the distributors exchanged price information such

as that found objectionable in United States v. Container Corp., 393 U.S. 333, 335 (1969) (exchange of information among competitors as to most recent prices charged specific customers).

As for the exchange of credit information, appellants introduced evidence that the record distributors' credit managers attended meetings of the National Association of Credit Managers and its regional affiliate, the Credit Managers Association of Southern California, and that at those meetings they exchanged information regarding individual retailers' credit histories.

Appellants suggest that the decision of the Supreme Court in Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980), is that all exchange of credit information is a per se violation of section 1 of the Sherman Act. On the contrary, the court stated that, assuming plaintiff could prove that the defendants agreed to fix credit terms to their customers, such an

agreement would be a per se violation of section 1. In fact the court in Catalano Manufacturing Protective Association v. United States, 268 U.S. 588 (1925), permitting exchange of credit information for the individual use of each member in determining whether to exercise credit. 446 U.S. at 648 n.12.

The appellants' evidence indicated that the information exchanged by the credit managers regarding certain retailers' credit standing was of the sort the distributors could use for self protection purposes. For example, the distributors exchanged information regarding individual retailers' total indebtedness. However, there was no indication of any agreement to fix credit terms aside from appellants' observation that large retailers in fact received more favorable credit terms than Marin Music Centre -- a hardly surprising result in light of their relative volume of sales.

2. Vertical Conspiracy

Appellants allege a number of vertical conspiracies each based on the sales agreement between a distributor and a favored retailer which "caused discrimination in the sale of phonograph records and tapes to the named retail chain stores." In essence, appellants suggest that price discrimination between individual buyers and sellers which would ordinarily form the basis of a secondary-line Robinson-Patman case is also a violation of section 1 of the Sherman Act. Yet the court have held that such an agreement, without proof of an arrangement to exclude others from the buyer's market does not give rise to a section 1 claim.[19/] See e.g., National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81 (D.D.C. 1977), aff'd, 595 F.2d 888 (D.C. Cir. 1979); Rutledge v. Electric Hose & Rubber Co., 327 F. Supp. 1267 (C.D. Cal. 1971), aff'd, 511 F.2d 668 (9th Cir. 1975).

In National Tire, for example, the court rejected the plaintiff's claim that a newspaper's failure to sell its advertising on the same terms as it gave to plaintiff's main competitor violated section 1, stating:

> [P]laintiff does not allege any basis for a vertical combination in violation of section 1. The contract for advertising space between the Post and Market, albeit a conbination, is not a combination within the scope of section 1. The contract sets forth the terms of dealings between the parties; plaintiff does not allege that the terms of the contract in any way restrict either party's dealings with others.

441 F. Supp. at 81.

Here appellants presented no evidence of any vertical agreement to exclude competitors. Instead, the record indicates that certain retailers negotiated a favorable price . . . individual distributors. However, even were we to assume some evidence of an exclusionary effect, we have held that such vertical arrangements are not a per se violation of section 1. See

Ron Tonkin, 637 F.2d at 1382-87; Gough v. Rossmoor, 585 F.2d 381, 388 (9th Cir. 1978); Mutual Fund Investors, 553 F.2d at 626; Joseph Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 78-79 (9th Cir. 1969). Therefore such agreements do not violate section 1 unless they are found to be unreasonable. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1304 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3354 (U.S. Nov. 9, 1982) (No. 82-396). The reasonableness inquiry is "directed to a balancing of the competitive evils of the restraint against the anticompetitive benefits asserted on its behalf." Gough, 585 F.2d at 388-89.

Here there is simply no indication that the sales agreements between individual distributors and retailers constituted an unreasonable restraint of trade. Indeed, the Supreme Court has recognized that the price discrimination which results where buyers seek competitive advan-

tage from sellers encourages the aims of the Sherman Act, a respect in which the Sherman Act is inconsistent with the aims of the Robinson-Patman Act. See Great Atlantic & Pacific Tea Co., 440 U.S. at 82, 83 n.16; Automatic Canteen Co. v. FTC, 346 U.S. 61, 73-74 (1953). And while appellants point to injury to their particular business, they do not make the necessary showing of a substantially adverse affect on competition in the record market in general. See Ron Tonkin, 637 F.2d at 1388; Mutual Fund Investors, 553 F.2d at 627. In fact, as the district court observed, appellants themselves acknowledge the competitive character of the record and tape sales market. Thus the district court correctly held that appellants had failed to raise a genuine issue of material fact in support of their vertical conspiracy charge.

B. The Section 2 Attempted Monopolization Claim Against MTS

Appellants claim that MTS attempted to monopolize the retail market in record and tape sales in the San Francisco Bay Area in violation of section 2 of the Sherman Act. An attempted monopoly claim under section 2 consists of three elements: (1) a specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. Twin City Sportservice, 676 F.2d at 1308; Portland Retail Druggists, 662 F.2d at 647. William Inglis, 668 F.2d at 1027.

In Inglis we discussed at length the interrelationship between the three elements. Thus we observed that intent to monopolize may be inferred from anticompetitive conduct but that to carry such a burden the conduct "must fall into one of two categories, either (1) conduct forming

the basis for a substantial claim of restraint of trade, or (2) conduct that is clearly threatening to competition or clearly exclusionary." 668 F.2d at 1029 n.11. In either case the conduct "must be such that its anticompetitive benefits [are] dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power." Inglis, 668 F.2d at 1030. In turn, the dangerous probability of success requirement, which is usually although not necessarily, associated with market power may be inferred from direct evidence of intent implemented by conduct, or conduct alone of the sort described above, from which intent may be inferred. 668 F.2d at 1029.

As the district court observed appellants presented no direct evidence of specific intent to monopolize, relying instead on MTS' alleged anticompetitive conduct to prove a violation of section

2. Their chief claim in this regard is that Tower engaged in predatory pricing by setting its prices for records and tapes below appellants' cost of doing business.

A predatory price exists "where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup profits." Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 856 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978). In making such a determination we have had occasion to identify as a useful standard for predation the test set out by Professors Areeda and Turner. See P. Areeda & D. Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975); Inglis, 668 F.2d at 1033; Janich Bros., 570 F.2d at 858. Under this approach a price is not predatory if it equals or exceeds the average variable cost of production. P. Areeda & D. Turner, Predatory Pricing, supra, at

711.[20/]

Pursuing such a guide, appellants' predatory pricing claim would appear to be inadequate on its face since it does not suggest that MTS priced below its own average variable cost -- but that it was below only some unidentified cost of appellants. In Inglis we indicated that a plaintiff might be able to prove a predatory pricing claim without showing that the defendant priced below its average variable cost, see 668 F.2d at 1035, or even possibly below its average total cost.[21/] However, in such instances it is the plaintiff's burden to prove that the defendant "sacrificed greater profits or incurred greater losses than necessary in order to eliminate the plaintiff." Inglis, 688 F.2d at 1036. In the absence of such a claim on the part of appellants, much less any evidence of that effect, appellants' predatory pricing claim is inadequate as a matter of law. Indeed, any other conclusion would support the

perverse rationale that a defendant may not compete by lowering its prices "if competition would injure its competitors." California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727 (9th Cir. 1979).

Appellants' other example of MTS' predatory conduct concerns MTS' negotiation of favorable sales terms with the individual distributors. Yet we have already concluded that such conduct did not constitute an unreasonable restraint of trade under section 1 of the Sherman Act. And since, as we have previously stated, the reasonableness standard of section 1 governs parallel conduct under section 2, see Inglis, 668 F.2d at 1030 n.14; California Computer Products, 613 F.2d at 737, MTS' actions do not constitute a "substantial restraint of trade" in violation of section 2. Nor do we consider the attempt to negotiate favorable terms here "conduct that is clearly

threatening to competition or clearly exclusionary."

Our conclusion regarding MTS' conduct in this case is reinforced by the evidence in the record concerning its market power. In Inglis we recognized that a defendant may introduce evidence "that market conditions are such that a course of conduct described by the plaintiff would by unlikely to succeed in monopolizing the market." 668 F.2d at 1030. See also Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 936 (9th Cir. 1980), cert. denied, 450 U.S. 921 (1981). Aside from their claim of "breath-taking growth of monopoly power," appellants suggested no evidence of market power whatsoever. In contrast MTS, introduced evidence that it operated only two retail stores in the six San Francisco Bay Area counties which the appellants asserted constituted a relevant geographic market and that it accounted for no more than 10% of the total retail record and tape

sales in that area.[22] The absence of significant market power on the part of the MTS and the existence of numerous other retail outlets lends further weight to our conclusion that the appellants failed to raise an isssue of material fact regarding the attempted monopolization claim.[23]

C. Capitol's Refusal to Deal

Appellants contended that the district court erred in granting summary judgment in favor of Capitol on their refusal to deal claims under sections 1 and 2 of the Sherman Act. This court has previously held that a party may refuse to deal with another "provided there is no effect which contravenes the antitrust laws." Mutual Fund Investors, 553 F.2d at 626. In such cases, the adverse effects of the termination on the party refused are not relevant "when the refusal 'is for business reasons which are sufficient to the [defendant] in the absence of any agreement restraining trade.'" Chandler Supply Co. v. GAF

Corp., 650 F.2d 983, 989 (9th Cir. 1980) (quoting Bushie v. Stenocord Corp., 460 F.2d 116, 119 (9th Cir. 1972)). Accord Marquis v. Chrysler Corp., 577 F.2d 624, 640 (9th Cir. 1977). Such a determination is not appropriate for summary judgment where there is a material issue of fact regarding the defendant's unlawful intent or the anticompetitive effect of its action. California Steel & Tube v. Kaiser Steel Corp., 650 F.2d 1001, 1004 (9th Cir. 1981); Program Engineering, 634 F.2d at 1196.

The district court concluded that Capitol's acknowledged aim of attempting to avoid future litigation after its settlement with appellants constituted a legitimate business purpose for the termination. During the period covered by the complaint, Capitol sold approximately $3,800 of records and tapes per year to Marin Music Centre. In June, 1975, Capitol and appellants entered into an agreement settling all, of appellants'

claims existing on that date for $7,500, but expressly permitting appellants to bring an action for events occurring after the date of the settlement. Capitol introduced evidence indicating that it stopped selling to Marin Music because of the near certainty that continuing business would give rise to litigation whose costs would exceed any benefits derived from that business.

Appellants point to two Ninth Circuit cases, Knutson v. Daily Review, Inc., 548 F.2d 795, 805 (9th Cir 1976), cert. denied, 433 U.S. 910 (1977), and Germon v. Times Mirror Co., 520 F.2d 786, 788 (9th Cir. 1975), which suggest in dicta that a court may enjoin a defendant in an antitrust action from refusing to deal with the plaintiff. However, both of those cases involve the use of injunctions to preserve the status quo during the litigation, and more importantly, they recognize that the termination must be pursuant to a plan "to foster an unlawful competitive

scheme." 520 F.2d at 788.

In contrast, in House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962), the court explicitly held that in the absence of any arrangement to restrain trade a manufacturer's refusal to deal with a retail store because of an antitrust suit filed against it by the store did not constitute an unlawful purpose in violation of the Sherman Act:

> Appellee does not cite, and we have not found any case in which a "refusal to deal" based on a customer's prosecution of a suit against a manufacturer has been held to constitute an unreasonable restraint of trade. This when considered is not astonishing, for the relationship between a manufacturer and his customer should be reasonably harmonious; and the bringing of a lawsuit by the customer may provide a sound business reason for the manufacturer to terminate their relation.

298 F.2d at 871 (citations omitted). Thus Capitol's acknowledged purpose of avoiding future litigation whose costs exceeded the benefits from doing business with appellants qualified as a legitimate business

reason for refusing to deal. See Marquis, 577 F.2d at 620.

As the district court recognized, appellants' only attempt to prove that the termination was otherwise violative of the antitrust laws was to suggest that it was connected with the alleged horizontal and vertical conspiracies among the distributors and chain store retailers. However, appellants introduced no evidence indicating any connection between the conspiracies alleged and the termination sufficient to raise an issue of material fact. See ALW, 510 F.2d at 55. Indeed Capitol's action did not even prevent appellants from selling its records. Capitol introduced evidence that its records were available from independent distributors and were in fact carried in appellants' store long after the termination. In any event, since we have concluded that appellants have failed to raise an issue of material fact regarding the existence of any such vertical or

horizontal conspiracy, their allegations against Capitol based on those conspiracies were also appropriate for summary judgment.

IV. CONCLUSION

The district court's judgment in favor of appellees on appellants' Robinson-Patman claims is reversed except as to Doug Robertson. The court's judgment as to the Sherman Act claims is affirmed. The case is remanded for further proceedings consistent with this opinion.

FOOTNOTES

1/ Polygram Distribution, Inc. is the company's present name. The company was known as UDC, Inc. between 1971 and 1973, and Phonodisc, Inc. between 1974 and 1977.

2/ At the time of the filing of this action, MTS was the sole shareholder of Tower Enterprises, Inc., doing business as Tower Records. Since that time, Tower Enterprises, Inc. has merged into MTS.

3/ The district court limited the summary judgment to this period because the declaration of Dale Johnson, a Polygram employee, filed in support of the motion, did not demonstrate personal knowledge for the 1971-73 period. The court denied Polygram's motion for the period 1971-73 without prejudice to its renewal.

4/ The court's order effectively removed Capitol as a defendant. However, since Capitol neither requested nor received a separate judgment under Rule 54(b) of the Federal Rules of Civil Procedure it did not take an appeal until after the court entered final judgment in June, 1980.

5/ In summary, the appellees in this action include five distributors: WEA, Polygram, Capitol, ABC, and MCA; one retailer, MTS; and Doug Robertson Advertising Agency. Appellants appeal the following rulings with respect to each defendant:

WEA: June 21, 1976, CR 311, partial summary judgment on the Robinson-Patman claims.

January 17, 1980, CR 808 summary judgment on th Sherman Act claims.

POLYGRAM:	August 17, 1977, CR 499, partial summary judgment on the Robinson-Patman claims for 1974-76. January 17, 1980, CR 808, summary judgment on the Robinson-Patman claims for 1971-73 and on Sherman Act claims.
MCA:	January 17, 1980, CR 808, summary judgment on both the Robinson-Patman and Sherman Act claims.
CAPITOL:	September 28, 1978, CR 636, summary judgment on the refusal to deal Sherman Act claim.
ABC:	May 12, 1980, CR 808, summary judgment on both the Robinson-Patman and Sherman Act claims.
MTS-TOWER & DOUG ROBERTSON:	January 17, 1980, CR 808, summary judgment on both the Robinson-Patman and Sherman Act claims.

6/ WEA is a wholly owned subsidiary of Warner Brothers Records, Inc., which in turn is owned by Warner Communications, Inc. WEA distributes records and tapes manufactured by Warner Brothers Records and two other Warner Communications, Inc. subsidiaries, Elektra Records and Atlantic Records. Polygram is a California corporation distributing records and tapes produced by affiliated corporations, Polygram, Inc. and Polydor International.

7/ MCA is a wholly owned subsidiary of MCA Records, Inc. From 1971 to 1979 ABC was a wholly owned subsidiary of American Broadcasting Companies, Inc. In 1979, it went out of business and its assets were sold to MCA.

8/ Although MCA's declaration in support of its motion for summary judgment does not contain any percentage figures on the amount of records and tapes manufactured outside of California, it seems to indicate that a substantial amount of the records in its California warehouse were manufactured in Illinois. ABC's answers to interrogatories indicate that an unidentified percentage of the records and tapes in its California warehouse were manufactured outside of California.

9/ The relevant jurisdictional language in section 2(a) reads:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce to discriminate in price between different purchases . . . where either or any of the purchases involved in such discrimination are in commerce.

10/ Appellees argue that Gulf Oil superseded the "flow of commerce" test and therefore requires an actual sale across state line to invoke the Act. However, in Gulf Oil, the product sold, asphaltic concrete, was manufactured entirely in state from products obtained intrastate and its market was entirely local. 419 U.S. at 192. Therefore, the Court did not have to address the issue when sales of goods produced in another state are "in commerce."

In fact, however, the court in Gulf Oil repeatedly refers to the flow of com-

merce test. Thus in comparing the Sherman Act and Robinson-Patman Act jurisdictional provisions the Court states:

> In contrast to § 1, the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce -- the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the customer.

419 U.S. at 195.

Accordingly, court interpreting section 2(a) after Gulf Oil continued to apply the "flow of commerce" analysis. See L & L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113, 1116, (5th Cir. 1982); Great Atlantic & Pacific Tea Co. v. FTC, 557 F.2d 971, 979 (2d Cir. 1977), revd. on other grounds, 440 U.S. 69 (1979); Hampton v. Graff, 516 F.2d 100 (5th Cir. 1975).

11/ The other indicium of intent involves whether goods have been altered or processed in some fashion after their arrival in the state of their eventual sale. Courts have generally held that where goods are processed in some substantial way the flow of commerce ends when they arrive at the place of alteration. See Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), cert. denied, 408 U.S. 928 (1972); Baldwin Hills Building Material Co. v. Fibreboard Paper Products Corp., 283 F. Supp. 202 (C.D. Cal. 1968); Von Kalinowski, supra, at § 26.02[3].

In this case, since the records and tapes were sealed after manufacture, this factor is not relevant.

12/ In American Building Maintenance, the Supreme Court held that two janitorial service corporations were not "in commerce" as required under section 7 of the Clayton Act. In particular the court rejected the United States' claim the firms' purchases of cleaning equipment manufactured out of state provided jurisdiction:

> [T]hose products were purchased in intrastate transactions from local distributors. Once again, therefore, the Benton companies were separated from direct participation in interstate commerce by the pricing and other marketing decisions of independent intermediaries. By the time the Benton companies purchased their janitorial supplies, the flow of commerce had ceased.

422 U.S. at 285. In contrast, here there is a legitimate question of material fact whether the record retailers were in fact insulated from interstate commerce by WEA or Polygram.

13/ Appellants interpret Inglis to suggest that any interstate sales by the record distributors here satisfy the Robinson-Patman jurisdictional requirements. However, their reliance on Inglis fails to recognize the structural difference between the two cases. Inglis was a "primary line" Robinson-Patman case in which the plaintiff alleged damaged his bakery. As the court in Inglis noted, in such a primary line case the relevant sales for jurisdictional purposes include all sales, both intrastate and interstate, reflecting the price disparity since the

court is concerned with all sales which allegedly damaged a competitor's business.

In contrast, this is a "secondary line" case, in which one buyer complains of discriminatory treatment between itself and another buyer. In such a case, the only relevant sales are those between the competing buyers. Meyer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763, 767 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1974); P. Areeda & D. Turner, supra, at ¶ 233(c). Out of state sales made by the distributors are irrelevant in this case since they were not made to stores competing with appellants.

14. Sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(d) and 13(e) provide:

> (d) Discriminatory payments for services or facilities
>
> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
>
> (e) Discrimination in furnishing services of facilities

> That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15/ The district court also dismissed appellants' claim against MTS under sections 2(d) and 2(e) for receiving discriminatory payments or services. Unlike section 2(f), sections 2(d) and 2(e) do not provide for a buyer's liability for receiving enumerated benefits. See Rowe, supra, at § 14.5. Consequently there is no private right of action against buyers for violating those sections. See Grand Union Company V. FTC, 300 F.2d 92 (2d Cir. 1962); Rickles, Inc. v. Frances Denney Corp., 1980-81 Trade Reg. Rep. (CCH) ¶ 63,829 (D. Mass. 1981); General Beverage Sales Co. v. East Side Winery, 396 F. Supp. 590 (E.D. Wis. 1975). Cf. American News Co. v. FTC, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962) (FTC may reach such conduct as an "unfair trade practice" under section 5 of the Clayton Act, 15 U.S.C. § 15).

16/ The district court observed the same evidentiary shortcomings on appellants' part in its opinion granting summary judgment in favor of Capitol on the refusal to deal claim in September, 1978, see 1978-2 Trade Cases ¶ 62,269 (N.D. Cal. 1978), and its subsequent opinion granting summary judgment on the Sherman Act claims in favor of appellees WEA, MCA, Polygram, MTS and Doug Robertson of June, 1980. 533 F. Supp. 540 (N.D. Cal. 1980).

17/ Appellants also allege a variant of the overall conspiracy consisting of a series of conspiracies between all the distributors and each chain store retailer. Summary judgment was appropriate as to this claim for the same reasons as in our discussion of the overall conspiracy set out below.

18/ In what appears as an afterthought, appellants also claim that the distributors engaged in resale price maintenance. Yet they offered no probative evidence in support of this proposition. Moreover, the claim is fundamentally inconsistent with their principal theory of the case -- that the Zoslaws were unable to compete with the large retailers because the distributors gave those retailers more favorable terms. Under appellants' theory, retail price maintenance would have been advantageous to them since it would have restricted the large retailers' ability to undercut their prices.

19/ In contrast, we have recognized that a predatory pricing claim may form the basis of both a primary-line Robinson-Patman case alleging injury to another seller and a section 2 Sherman Act claim since both statutory provisions "are directed at the same evil and have the same substantive content." William Inglis, 668 F.2d at 1041 (quoting Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977)). Here, however, appellants' secondary-line Robertson-Patman claim -- that they did not receive the same price as a competing buyer -- has no direct counterpart under section 1 of the Sherman Act.

20/ According to Areeda and Turner average variable cost is actually an imperfect substitute for marginal cost, made necessary because business firms rarely keep records reflecting marginal cost. P.

Areeda & D. Turner, Predatory Pricing, supra, at 717. A price equal or exceeding marginal cost is the appropriate test because then only less efficient producers will suffer larger losses per unit. In addition a price equal to marginal cost signals to consumers the "true social cost" of producing the additional unit, therefore promoting the efficient allocation of resources. P. Areeda D. Turner, Predatory Pricing supra, at 710-713; Inglis, 668 F.2d at 1032.

21/ Inglis specifically reserved the question whether a price above the defendant's average total cost could ever be considered predatory. 668 F.2d at 1035 n.30. In that instance the producer recovers the total cost of production, including fixed costs, as well as a "normal" rate of return on its investment, making the price "profitable" from an economist's view. Id.

22/ MTS did not operate any stores in Marin County during the period in question. Its two stores in the San Francisco Bay Area are in San Francisco-Marin County market since that is the only geographic area of competition between Marin Music Centre and MTS. Yet appellants did not present any evidence nor do they even argue that MTS' share of this submarket is larger than its share of the six San Francisco Bay Area counties. Indeed, MTS only operates one store in the "San Francisco-Marin County" market.

23/ Appellants' complaint also charged MTS with monopolization of the retail record and tape market in violation of section 2 of the Sherman Act. The district court granted summary judgment on this claim and appellants do not raise this issue on appeal. In any event, appellants' failure to respond to MTS' evidence of its relatively small market share made summary

judgment on this claim appropriate. See e.g., Forro Pricision, Inc. v. International Business Machines Corp., 673 F.2d 1045, 1058 (9th Cir. 1982) (evidence of 35% of market share alone insufficient as a matter of law to support monopolization claim).

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES ZOSLAW AND JANE ZOSLAW, husband and wife, dba MARIN MUSIC CENTRE, Plaintiffs, vs. COLUMBIS BROADCASTING SYSTEM, INC., a corporation, et al., Defendants.	)	No. C-75-0007 RFP OPINION

I. INTRODUCTION

A. Summary

Plaintiffs, the owners of a retail music store, brought this antitrust action in January 1975 against a number of phonograph record and tape manufacturers' dis-

tributors and certain of their retail customers alleging violations of the Robinson-Patman and Sherman Act.

In June 1976 and thereafter, this court granted summary judgments in favor of several of the defendant's distributors on the Robinson-Patman claims on the basis that there was no subject matter jurisdiction because the allegedly discriminatory sales were not in interstate commerce.[1/] In addition, settlements disposed of claims against other defendants.[2/]

At this point six defendants remain in this lawsuit. Presently, five of the six remaining defendants move for summary judgment.[3/]

Having heard argument on these motions, and after considering the supporting papers and reviewing the voluminous record, it is the decision of this court to grant defendants' motions for summary judgment against plaintiffs for two independent reasons.

First, plaintiffs have failed in their reply to defendants' motions to produce competent evidence from which it could be inferred that the alleged violations occurred, as required by Rule 56(e) of the Federal Rules of Civil Procedure and our own Local Rule 220-8.

Second, plaintiffs' factual contentions, even if accepted as we must for the purpose of ruling on the merits of plaintiffs' legal claims, do not support any viable theory of liability against the defendants now before the court.

B. Parties

Plaintiff Retailers

Plaintiffs Charles Zoslaw and Jane Zoslaw did business under the name Marin Music Centre and operated a Mill Valley retail music store which sold phonograph records and equipment prerecorded tapes, and other related merchandise. The store opened in August 1965 and engaged in business until closing in May 1977.

Defendant Distributors

Three of the five defendants presently before the court are record distributors: Warner/Electra/Atlantic Corporation ("WEA"); MCA Distributing Corporation ("MCA"); and Polygram Distribution, Inc. ("Polygram").

WEA is a New York corporation engaged in wholesale distribution of phonograph records and tapes produced by Warner Communication Corporation.

MCA is a New York corporation which is a wholly-owned subsidiary of MCA Records, a manufacturer of phonograph records and tapes. MCA is engaged in wholesale distribution of its parent corporation's goods.

Polygram is a California corporation which manufactures phonograph records and tapes and distributes these products wholesale through its wholly-owned subsidiaries. The subsidiaries involved in this suit are Phonodisc, Inc. and Phonodisc's predecessor UDC, Inc.

WEA, MCA, and Polygram through its subsidiaries sold phonograph records and tapes to plaintiffs and other retail stores in the San Francisco Bay Area during the time period relevant to this litigation.

Defendant Retailer

The fourth defendant moving for summary judgment is a record retailer and is comprised of MTS, Inc. and Tower Enterprises, Inc. ("MTS-Tower"). MTS, Inc. is a California corporation which owns stock in and operates a number of retail record and tape stores including 14 stores in California. MTS, Inc. is the sole shareholder of Tower Enterprises, Inc., a California corporation doing business as Tower Records, a retail record store in San Francisco. Neither MTS, Inc. nor Tower Enterprises, Inc. have ever owned or operated any retail store in Marin County where plaintiffs' store was located. MTS, Inc. and Tower Enterprises, Inc. doing

business as Tower Records have been sued and have defended jointly. For purposes of analysis they may be treated as a single entity: MTS-Tower.

Defendant Advertiser

The fifth and final moving party defendant is Doug Robertson Advertising, Inc. ("Doug Robertson Advertising"), a California corporation engaged in the advertising business. Doug Robertson Advertising owns five percent of the stock of five of the retail record stores operated by MTS-Tower, and Doug Robertson Advertising was the advertising agency for MTS-Tower during the time period pertaining to this suit.

C. Background

Four years of discovery reveal that the facts underlying this action are straightforward albeit voluminous. For the most part the facts are uncontroverted and need only be summarized here.

In 1965 plaintiffs Charles and Jane Zoslaw opened a retail store, known as

Marin Music Centre, which sold records, stereos, television sets, sheet music and musical instruments from a single location in a shopping center in Mill Valley. At the time the Zoslaws opened their store there were few other record stores in Marin County. Neither plaintiff had prior experience in retailing phonograph records and prerecorded tapes, nor in any other retail business except for Mr. Zoslaw's involvement with a family grocery business in his earlier years.

Plaintiffs suffered startup losses in 1965 and 1966 and claim to have operated at a profit for the following two years. After this the store entered financial difficulties from which it never recovered. The record shows that Marin Music Centre suffered losses by at least 1971 and that this trend continued until the store went out of business in May 1977.

Between the onset of Marin Music Centre's continuing money troubles and the time it ceased doing business the Marin

County market changed dramatically. During this period several other stereo and record retailers, an musical instrument outlets opened in Marin County. Simultaneously the number of record departments in department stores, drug stores, and grocery stores also increased. These record departments compete for sales with retail stores like Marin Music Centre.

The market became extremely competitive. This court has previously indicated that the Marin County retail record business was characterized by "price wars." Zoslaw v. Columbia Broadcasting System, Inc., CCH 1977-1 Trade Cases ¶ 61,334 (N.D. Cal.); Zoslaw v. CBS, Inc., CCH 1978-2 Trade Cases ¶ 62,269 (N.D. Cal.). As plaintiff testified, Marin Music Centre's prices were higher than those of its competitors.[4/]

In January 1975, a little over two years before closing the store, the Zoslaws brought this action. As initially framed by the complaint, this was essen-

tially an action for illegal price discrimination against a number of phonograph record and tape manufacturers, their distributors and certain of their retail customers. Plaintiffs alleged that the distributor defendants sold their products to retail chain stores at lower prices than those offered to single stores such as plaintiffs' Marin Music Centre in violation of section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). Plaintiffs also alleged that the defendants discriminated in favor of retail chain stores by granting promotional allowances and by furnishing special services in violation of sections 2(d) and 2(e) of the Act, 15 U.S.C. §§ 13(d) and 13(e).

Plaintiffs alleged that certain of these retail stores knowingly induced and received these purported price descriminations and favorable treatment contrary to sections 2(d), 2(e) and 2(f) of the Robinson-Patman Act, 15 U.S.C. §§ 13(d), 13(e) and 13(f).

Rounding out the complaint, plaintiffs charged a conspiracy in restraint of trade in violation of sectin 1 of the Sherman Act, 15 U.S.C. § 1.

In early 1976 plaintiffs filed an amendment complaint adding new defendants and increasing the amount of damages sought.

Thereafter this court entered summary judgment in favor of several of the distributor defendants on the Robinson-Patman Act claims. Plaintiffs amended their complaint by substantially realleging the Robinson-Patman claims as a series of conspiracies by the defendants to discriminate. This second amended complaint was filed in October 1976.

In March 1977 this court denied plaintiffs' preliminary injunction motion directed against the alleged discriminations.

Finally, in November 1977 plaintiffs amended the comnplaint a third time by alleging that the defendants had forced

them out of business. Five of the remaining six defendants now move for summary judgment.

II. THE LACK OF FACTUAL SUPPORT FOR PLAINTIFFS' CLAIMS

Plaintiffs filed a massive set of opposition papers which regularly and systematically violate the rules governing responses to motions for summary judgment. Since plaintiffs' papers do not comply with the requirements of the Federal Rules of Civil Procedure or the Local Rules of the Northern District of California, we find that plaintiffs fail to present competent evidence to support either their Robinson-Patman or Sherman Act claims against the summary judgment motions of the five defendants before the court. This serious deficiency under Rule 56(e) of the Federal Rules of Civil Procedure and also Local Rule 220-8 is, by itself, a sufficient ground for entering summary judgment in favor of defendants. First National Bank v. Cities Service, 391

U.S. 253, 288-90 (1967); Thornhill Publishing Co. v. General Telephone & Electronics, 594 F.2d 730, 738 (9th Cir. 1979); Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977).

Rule 56 of the Federal Rules of Civil Procedure and Local Rule 220-8 provide an orderly procedure by which parties present the court with the factual information necessary to decide motions for summary judgment. In particular, Rule 56(e) provides in part:

> Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise pro-

> vided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Northern District's Local Rule 220-8 concerning "Affidavits and Declarations" provides in part:

> Factual contentions made . . . in opposition to any motion shall be supported by affidavits or declarations . . . Extracts from depositions, interrogatory answers, requests for admission and other evidentiary matter will be considered only if presented appropriately authenticated by affidavit or declaration.

The defendants' replies to plaintiffs' opposition to summary judgment, and for that matter, the entire record are rife with examples of plaintiffs failure to comply with the aforementioned rules.[5/]

This court has only recently admonished the same plaintiffs, directing their attention to their duty to provide proper authentication for the facts upon which they rely in opposing a summary judgment motion. In granting defendant Capitol

Records' motion for summary judgment, we underscored the gravity of plaintiffs' disregard of the rules:

> Plaintiffs' opposition to the summary judgment motion is hardly a model of correct form. No evidentiary affidavits or declarations are attached, most of the assertions are undocumented, and those that are documented are simply references to answers to interrogatories or depositions, many of them self-serving hearsay, which are contained in the case file. They do not conform to the requirements of Fed. R. Civ. P. 56(e) or Local Rule 220-8. Plaintiffs' attorney did, however, attach his own affidavit to the effect that "there is no way such an extensive documentation of evidence can be handled through the filing of exhibits attached to declarations in support of opposition memoranda." We sympathize with this general problem, but in this case it cannot excuse the manifest inadequacies of plaintiffs' position.

Zoslaw v. CBS, CCH 1978-2 Trade Cases ¶ 62,269 at p. 75674.

Notwithstanding our admonition, plaintiffs' opposition papers to the latest series of summary judgment motions are blatantly inadequate under the governing rules. Here it will serve to illustrate

by way of example what is, we are afraid, merely the tip of the iceberg.

Under optimal circumstances the tremendous volume of plaintiffs' opposition papers would have been burdensome. However, plaintiffs' careless presentation and poor organization impedes any conscientious effort to review their evidence. Plaintiffs have contended that attaching evidentiary documents to their memoranda in compliance with Federal Rule 56(e) and Local Rule 220-8 is impractical, given the thousands of pages involved. We agree, but this does not absolve plaintiffs from the obligation to make the supporting documentation readily accessible to the court or to opposing parties for the purpose of substantiating plaintiffs' factual contentions and inferences. A party should not prevail simply by clogging the court and smothering the opposition with a heap of ersatz evidence. If anything, in cases where evidence is voluminous, as compared to

simpler controversies, the offering party is under a greater obligation to organize, summarize, index and identify the underlying documentation. In this case we found it necessary to sift through hundreds of pages of documents in order to find evidence referred to in plaintiffs' memorandum. Sometimes we were unable to ever locate the referenced document,[6/] and many documents, characteristically misfiled, were found only after lengthy searches.[7/]

In addition, plaintiffs' papers fall far short of the standard for authentication set by the Ninth Circuit. United States v. Dibble, 429 F.2d 602 (9th Cir. 1970); see also Mabey v. Regan, 376 F. Supp. 216, 223 (N.D. Cal. 1974), rev'd on other grounds, 537 F.2d 1036 (9th Cir. 1976). Plaintiffs' memorandum regularly refers to documents which are unauthenticated or unexplained.[8/] With great frequency plaintiffs attempt to authenticate cited documents is improper.[9/]

Further, aside from plainfiffs' fail-

ure to identify and authenticate documents, they have not proferred evidence which supports their factual allegations. Plaintiffs have asserted many factual allegations for which they provide no citations whatsoever.[10/] And even where documents are cited, and can be located, we find that often the suggested inferences are implausible.[11/]

Considering this record in light of the applicable legal standards we conclude that summary judgment is appropriate.

Mindful that summary judgments are disfavored in antitrust cases where motive or intent is critical, such relief, properly used, is a valuable means to avoid squandering judicial time and resources. Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 622 (9th Cir. 1977). As the Ninth Circuit has stated, "To hold otherwise would give free rein to any plaintiff who can draft an antitrust complaint capable of withstanding a motion to dismiss to go to trial

with only a wing and a prayer supporting his well drafted complaint." Id. at 624.

The Supreme Court has specifically held that a party moving for summary judgment in an antitrust case should prevail, once the movant has met his burden, in the absence of "any significant probative evidence tending to support the complaint." First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968); Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451, 454 (9th Cir. 1979).

In order to prevail, the defendants are required first to demonstrate pursuant to Rule 56 of the Federal Rules of Civil Procedure "the absence of a genuine issue as to any material fact." In this case movants clearly met their burden of proof.

Defendants having sufficiently supported their motion, the plaintiffs must, if the case is to go to trial, controvert the defendants' showing. Cities Service, supra at 289; Fed. R. Civ. P. 56(e). In

considering plaintiffs' opposition we have construed all evidence and inferences in the light most favorable to plaintiffs as we must. United States v. Diebold, 369 U.S. 654, 655 (1962).

We find that plaintiffs failed to controvert the defendants' showing. Plaintiffs have not produced any competent evidence from which it could be inferred that the alleged violations occurred.

We will not permit plaintiffs to go to trial on the basis of the allegations in their complaint, coupled with the hope that something can be developed at trial in the way of support for the allegations. In the words of Mr. Justice Marshall, "while we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extent these rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full dress trial notwithstanding the absence of

any significant probative evidence tending to support the complaint." Cities Service, supra at 289-90.

III. THE LACK OF LEGAL SUPPORT FOR PLAINTIFFS' CLAIMS

Even if we found that plaintiffs had properly supported their factual contentions we would conclude, as a matter of law, that defendants are entitled to summary judgment. Plaintiffs' version of the facts simply do not support a viable theory of recovery.

A. Robinson-Patman Claims

1. Defendant Distributors

Since WEA has previously been granted summary judgment on the Robinson-Patman Act claims only two of the defendant distributors, MCA and Polygram, have outstanding claims against them.

We find here, as we have in ruling on earlier summary judgment motions that we lack subject matter jurisdiction over the Robinson-Patman Act claims asserted against MCA and Polygram.

To established Robinson-Patman jurisdiction, one of two sales which, when compared generate a discrimination, must cross a state line. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); Zoslaw v. CBS, Civ. No. 75-0007 GBH (Memorandum, June 21, 1976, p. 6). Further, where interstate sales are de minimis there is no price discrimination within the ambit of the Robinson-Patman Act. See Hanson v. Pittsburg Plate Glass Industries, Inc., 482 F.2d 220, 224 (5th Cir. 1973), cert. denied, 414 U.S. 1136 (1974); Skinner v. United States Steel Corp., 233 F.2d 762, 764 (5th Cir. 1956); F. Rowe, Price Discrimination Under the Robinson-Patman Act, § 4.9 at 78 (1962).

a. The lack of jurisdiction over MCA. Plaintiffs do not satisfy either of the tests for Robinson-Patman jurisdiction over MCA.

During the period from 1971 to 1978, MCA distributed its records and tapes to

its customers in the United States through a series of regional warehouses. Only MCA's Los Angeles warehouse was responsible for serving retailers selling MCA merchandise in the San Francisco Bay Area. Infrequently, MCA made direct shipments from its Illinois manufacturing plant to a retail outlet in the Bay Area. Such shipments are known as "drop shipments."

Goods sent from out of state to a storage point for general inventory purposes "leave" interstate commerce. Zoslaw v. CBS, supra (Opinion and Order on Eric-Mainland Distributing Company's Motion for Summary Judgment filed July 20, 1976); Country Maid, Inc. v. Hasenotes, 324 F. Supp. 875, 877 (E.D. Pa. 1971); 4 J. Von Kalinowski, Antitrust Laws and Trade Regulation, § 26.02[3] at pp. 26-42 - 26-43 (1976 ed.); accord, Hampton v. Graff Vending Co., 516 F.2d 100, 103 (5th Cir. 1975); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 210 (5th Cir. 1969).

There is no dispute over the fact that the records sent to Los Angeles were shipped for general inventory purposes and not for immediate resale as would be the case with perishable goods like milk. See Great Atlantic & Pacific Tea Co. v. FTC, 557 F.2d 971 (2d Cir. 1977), rev'd on other grounds, 440 U.S. 69 (1979); 1 P. Areeda & D. Turner, Antitrust Law § 233(b) (1978).

Consequently, MCA's goods shipped from the Los Angeles warehouse to the San Francisco Bay Area are wholly intrastate and not "in commerce."

Neither do MCA's drop shipments give rise to jurisdiction. Using plaintiffs' figures for the years from 1972 to 1977, inclusive, the cumulative percentage of MCA's sales to retailers in the Bay Area which was attributable to drop shipments was .475% of the total volume of orders or $90,369.71.[12/] In 1971 drop sales were less than 1%.[13/] Consistent with our earlier rulings in this case we find that

the volume of these drop shipments was de minimis.[14/]

Plaintiffs have argued, relying on Sherman Act cases, that returned merchandise shipped from a retailer in the Bay Area back to MCA's Illinois plant should be considered interstate traffic for the purpose of determining Robinson-Patman Act jurisdiction. We disagree. The relevant measure of jurisdiction in Robinson-Patman cases is the "in commerce" test rather than the less rigorous "affecting commerce" test applicable to Sherman Act claims. See Zoslaw v. CBS, supra (Memorandum of Decision, June 21, 1976, pp. 7-8) applying Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200-1 (1974). Returns of unwanted merchandise are not sales in interstate commerce within the Robinson-Patman Act.

For these reasons, we grant MCA's motion on the Robinson-Patman Act claims.

b. The lack of jurisdiction over Polygram. We have already granted summary

judgment in favor of Polygram on the Robinson-Patman claims for the years 1974-76 when Phonodisc, Inc. was Polygram's distributor. Here we grant summary judgment for the years 1971-73 which is the period when UDC, Inc. was a distributor.

Polygram (UDC), like MCA, serviced its Bay Area customers through its in-state warehouse in Sun Valley, California. These sales, as shown above, are intra-state and not within the Robinson-Patmam Act.

Moreover, a considerable portion of the merchandise involved was manufactured in California as well as being shipped from a California warehouse to a California retailer.

Drop sales provide no alternate basis of jurisdiction over Polygram (UDC). We conclude that plaintiffs unsubstantiated figure of $213,000.00 of drop sales is de minimis.[15/]

2. Defendant Retailer

Plaintiffs allege that retailer MTS-Tower induced or received price discriminations in violation of section 2(f) of the Robinson-Patman Act. The Supreme Court has recently held that a buyer cannot be held liable for a violation of section 2(f) unless the seller is liable for price discrimination under section 2(a) of the Act. Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 75-78 (1979). Having previously found that plaintiffs cannot satisfy the jurisdictional requirements as to their section 2(a) claims against the distributor-sellers, it conclusively follows under the rule of A & P that there cannot be a section 2(f) violation by MTS-Tower, retailer-buyer.

Plaintiffs also allege that MTS-Tower induced or received promotional allowances and services in violation of sections 2(d) and 2(e) of the Robinson-Patman Act. However, under the Act, there is no private right of action available to plain-

tiffs against an allegedly favored buyer with regard to allegedly illegal promotional allowances and services. General Beverage Sales Co. v. East Side Winery, 396 F. Supp. 590, 596 (E.D. Wis. 1975). In particular, sections 2(d) and 2(e) simply fail by their own terms to provide any sanction against a buyer who knowingly accepts discriminatory price, services, or facilities.[16/]

Accordingly, plaintiffs do not have a Robinson-Patman claim against MTS-Tower.

3. Defendant Advertiser

We frankly are unable to discern the factual or legal basis upon which plaintiffs hope to hold Doug Robertson Advertising liable. With respect to Robinson-Patman claims, it suffices that we find that there is no allegation or evidence that Doug Robertson participated in illegal conduct in interstate commerce, and thus jurisdiction is lacking. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186

(1974). Having decided on the other deficiencies of plaintiffs' claim.

B. Sherman Act Claims

1. Defendant Distributors

As a matter of law plaintiffs cannot prevail on their Sherman Act claims against the three defendant distributors, WEA, MCA and Polygram. Plaintiffs' own testimony highlight the fact that during the time of the alleged conspiracy to restrain trade, retail prices fell and the number of competing retailers rose.[17/]

Plaintiffs theorize that the alleged price discriminations which they cannot bring under the Robinson-Patman Act are conspiracies cognizable under the Sherman Act. Essentially, they postulate two conspiracies; first, an overall conspiracy which has horizontal and vertical aspects; and second, a completely vertical conspiracy.

We find it difficult, if not impossible, to conceptualize plaintiffs' overall conspiracy theory. Plaintiffs theorize

that the defendant distributors illigally conspired with retailers. However, plaintiffs do not allege a horizontal conspiracy involving only distributors. Instead, they present a notion which strains the imagination of an overall conspiracy arising from the consciously parallel acts of distributors and retailers.

In order to prevail on their overall conspiracy theory, plaintiffs must establish the existence of a conspiracy or agreement among the defendants. Plaintiffs offer no direct evidence of conspiracy, and all the defendants strenuously deny the allegations. Conceding the lack of independent evidence of the alleged conspiracies,[18/] plaintiffs invoke the doctrine of conscious parallelism.

For plaintiffs to establish a Sherman Act conspiracy through circumstantial evidence and the doctrine of conscious parallelism, plaintiffs must first show parallel conduct. Independent Iron Works, Inc. v. United States Steel Corp., 322

F.2d 656 (9th Cir. 1963). General similarity of conduct is not enough, even "substantially similar" manner of conducting business cannot alone support an inference of conspiracy. Theatre Enterprises, Inc. v. Paramount Film Distribution Corp., 346 U.S. 537, 540-41 (1954); Independent Iron Works, supra at 611-62; accord, Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977). Once again plaintiffs' presentation of their case has made our determintion difficult in that they have not identified precisely what behavior they believe constitutes parallel action. However, we find that the record demonstrates a lack of uniform behavior in the areas that plaintiffs apparently construe as examples of parallesism, i.e., prices and accounts classifications, advertising, and extension of credit. We further fail to discern any parallelism in other possibly significant areas, i.e., sales promotion programs, payment terms,

shipment terms, and merchandise return privileges.

Even had the record revealed parallel conduct, which we find it does not, this alone will not support an inference of concerted action. First National Bank v. City Service Co., 391 U.S. 253, 279-80, 287 (1968); Syufy Enterprises v. National General Theatres, 575 F.2d 233, 236 (9th Cir. 1978), cert. denied, 439 U.S. 954. In addition to evidence of parallel business behavior, two additional elements must be present before a conspiracy may be inferred: (1) a showing of acts by defendants in contradiction of their own economic interests, and (2) satisfactory demonstration of a motivation to enter into an agreement. Venzie Corp. v. United States Mineral Productions, Inc., 521 F.2d 1309, 1314 (3d Cir. 1975); Aviation Specialties Inc. v. United Technologies Corp., 568 F.2d 1186, 1192 (5th Cir. 1978); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir.

1978); D. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev 655, 681 (1962).

Nevertheless, we cannot find in the record, nor do plaintiffs contend, that there is evidence that defendants acted in a manner adverse to their economic interests. Nor have plaintiffs attempted to advance any colorable rationale for the alleged combination among competitors.[19/]

In contrast to plaintiffs' allegations of conspiracy in restraint of trade, the only plausible inference from the record is that defendants acted in response to competition and in a manner intended to meet competition.

We therefore conclude as a matter of law that plaintiffs theory of an overall conspiracy is without merit.

Plaintiffs are left with their allegation of vertical conspiracies, which we find to be frivolous and accordingly reject out of hand.

In the absence of a horizontal conspiracy to charge different prices or a vertical agreement to exclude competitors, price discrimination does not support a claim under section 1 of the Sherman Act. Rutledge v. Electric Hose & Rubber Co., 327 F. Supp. 1267, 1272 (C.D. Cal. 1971), aff'd, 511 F.2d 668 (9th Cir. 1975). We find no evidence of such agreements. Rather, we see in the record examples of competitive pricing. Nor can we find that combination exists in violation of section 1 merely because the distributor-sellers have negotiated a favorable price with retailer-buyers. A mere contract which does not restrict either party's dealings with others may be preferential, but it is not a restraint of trade. National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 87 (D.D.C. 1977). In reality, plaintiffs would have us construe the Sherman Act in a way that would interfere with the essence of trade and competition.

The root of this problem with the vertical conspiracy theory is that plaintiffs seek to prosecute an alleged price discrimination under the Sherman Act. This is simply contrary to the intent of Congress,[20] and is in "open conflict" with national antitrust policy. Automatic Canteen Co. v. FTC, 346 U.S. 61, 63, 73 (1953).

Being abundantly clear that there is no legal foundation for plaintiffs' Sherman Act claims, we grant summary judgment on these claims in favor of WEA, MCA and Polygram.

2. Defendant Retailer

For each of the reasons discussed above, plaintiffs' Sherman Act conspiracy charges against MTS-Tower must fail as a matter of law.

Now we need only analyze plaintiffs' charges that MTS-Tower has monopolized and attempted to monopolize in violation of section 2 of the Sherman Act.

At the outset we note that plaintiffs' monopoly theory is so crude, so haphazard at this late stage of the litigation that careful analysis risks lending it more credence than it deserves.

We also note, before exploring the convolutions of plaintiffs' legal theory, that plaintiffs' shortcomings under Rule 56(e) are particularly aggregious in its monopoly case against MTS-Tower. We are not so much troubled here by impermissible presentation of a surplusage of incompetent evidence as we are surprised and concerned by the absence of any attempt to offer evidence to support sweeping conclusory statements. We are not impressed by plaintiffs' imaginative and almost wholly undocumented recharacterization of the allegations of the complaint. Something more is required. First National Bank v. Cities Service, 391 U.S. 253, 288-90 (1967). No support whatsoever for the monopolization allegation

appears in plaintiffs' oppositon to MTS-Tower's motion for summary judgment.

For the sole purpose of applying the legal standards of monopoly power, we choose from plaintiffs' array of suggested markets the one most favorable to their case--the so-called "San Francisco-Marin Market." This market, we add, is the only arguable relevant market because it is the only conceivable geographic area of competition between plaintiffs and MTS-Power. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 484-89 (1977).

The undisputed facts show that MTS-Tower does not have monopoly power in the San Francisco-Marin market. MTS-Tower operates only two stores in the six Bay Area Counties, one each in San Francisco and Berkeley. There are literally hundreds of other sources for the retail purchase of records and tapes in the Bay Area. MTS-Tower's share is relatively small. Uncontroverted testimony put MTS-Tower's percentage of total retail sales

in this region at less than ten percent. Obviously, MTS-Tower's market share is neither predominant nor monopolistic. Twin City Sportservice, Inc. v. Charles Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (per Hand, J.).

The charge that MTS-Tower is liable for attempted monopolization is also fatally flawed.

Plaintiffs' proposed "short cut" for establishing an attempt to monopolize is the path to reversible error. We reject their interpretation of precendent.

There are three essential elements of an attempt to monopolize offense: The plaintiffs must show (1) specific intent to control price or exclude competition with respect to a part of commerce, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success. Gough v. Rossmour Corp., 585

F.2d 381, 390 (9th Cir. 1978), cert. denied, 429 U.S. 857; Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977). A fourth element of the offense is "causal antitrust injury," which is necessary to confer standing and to support a claim for damages. California Computer Products, Inc. v. IBM Corp., 1979-1 Trade Cases ¶ 62,713, pp. 2184-5 (9th Cir.).

The first indispensible element of an attempt to monopolize claim is proof of "specific intent to destroy competition or build a monopoly." Knutson v. Daily Review, Inc., 548 F.2d 795, 814 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977).

Plaintiffs have not offered nor even suggested that there is any direct evidence of specific intent plaintiffs must show that MTS-Tower's allegedly predatory conduct constituted a substantial claim of an unreasonable restraint of trade. California Computer Products, Inc. v. IBM Corp., supra at 2183; Knutson, supra at

814; Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8, 12 (9th Cir. 1973), cert. denied, 417 U.S. 932 (1974), reh. denied, 419 U.S. 1028 (1974). That is, specific intent to monopolize may be inferred from a violation of section 1 of the Sherman Act. California Computer Products, supra.

Plaintiffs erroneously rely on Gough, supra, for the proposition that specific intent to monopolize can be proven by evidence of predatory acts alone. It appears that plaintiffs offer examples of sharp practice in order to prove predation, and argue that from this showing the other two elements, specific intent and dangerous probability of success, may be inferred.[21/]

Indeed, if the law permitted such bootstrapping virtually every instance of vigorous competition would give rise to liability for attempted monopolization. Actually, Gough hoists plaintiffs by their own petard for it clearly states that in the absence of direct evidence there must

be "proof of predatory or anticompetitive conduct which constitutes an unreasonable restraint of trade. 585 F.2d at 390 (emphasis supplied). Predation alone is insufficient. Since there is no direct evidence and since we have already concluded that plaintiffs do not present a substantial claim of an unreasonable restraint, much less a violation of section 1 of the Sherman Act, plaintiffs are unable to establish specific intent.

We also conclude that there is no independent basis for determining the existence of the element of dangerous probability of success. Proof of dangerous probability of success "may be satisfied either by direct proof of market power . . . or by inference from the proven specific intent itself . . . ." California Computer Products, Inc. v. IBM Corp., supra at 2184. But we have shown that plaintiffs cannot establish MTS-Tower's monopoly market power or specific intent to attempt to monopolize.

Plaintiffs' total effort to address the probability of success element of their attempt claim is found in three sentences of the 86-page Opposition Memorandum, sentences which are typically conclusory and unsupported:

> 3. Dangerous Probability
>
> The restraints . . . resulted in breath-taking interstate growth of market power. It was attained by foreclosure of competitors including plaintiffs. These are two effects supportive of a finding of dangerous probability, separate and apart from the short-cut method laid down in Gough.

Plaintiffs' Memorandum, p. 80. We disagree. Plaintiffs cannot pull MTS-Tower to trial on this slender thread.

It follows from all of the foregoing that summary judgment must be granted in favor of MTS-Tower as to all of plaintiffs' Sherman Act claims.

4. Defendant Advertiser

Plaintiffs' sole theory of Sherman Act liability against Doug Robertson Advertising is that Doug Robertson Advertising

knowingly allowed MTS-Tower to effect restraints of trade. Plaintiffs' Memorandum, p. 80.

Given that we find that plaintiffs cannot show that any other defendants have conspired or illegally restrained trade, Doug Robertson Advertising cannot be liable for being a conspirator, or a complaint instrumentality of the purported restraints. Moreover, we find on the record, no other conceivable basis for liability.

Therefore we grant summary judgment in favor of defendant Doug Robertson Advertising.

IV. CONCLUSION

This is a case in which the operators of an unsuccessful business invoke the antitrust laws in order to recoup losses inflicted by stiff competition. However, the antitrust laws protect competition and not competitors. For all of the reasons set forth in this opinion, we grant summary judgment in favor of defendants WEA,

MCA, Polygram, MTS-Tower, and Doug Robertson Advertising and against plaintiffs Charles and Jane Zoslaw.

IT IS SO ORDERED.

Dated: January 17, 1980

Chief United States District Judge

FOOTNOTES

1/ Summary judgments on the Robinson-Patman claims were granted to the following defendants: (1) Warner/Electra/Atlantic Corporation, Order dated July 21, 1976; (2) Eric Mainland Distributing Company, Order dated July 20, 1976; and (3) CBS, Inc., Order dated April 18, 1977.

Polygram Distribution, Inc.'s motion for summary judgment was granted except for the period 1971-73 when United Distributing Company distributed records, Order dated August 17, 1977.

Capitol Records, Inc.'s motion for summary judgment was granted on identical Robinson-Patman claims made against the distributor defendants in the related case of Gramaphone v. CBS, Inc., CCH 1977-1 Trade Cases ¶ 61,260 (N.D. Cal., Dec. 15, 1976), after Capitol settled with the plaintiffs in this case.

2/ Retailers Integrity Entertainment Corporation doing business as "Wherehouse" and CBS, Inc. doing business as "Discount Records" were dismissed as defendants pursuant to settlements.

Distributors CBS, Inc., RCA Corporation, Eric Mainland Distribution Company, Transamerica Corporation, and Capitol Records, Inc. were dismissed as defendants pursuant to settlements. Capitol Records, Inc. entered into a voluntary settlement agreement in June, 1975. When the settlement failed, Capitol was granted summary judgment; Order dated September 26, 1978.

3/ Defendant ABC, Inc. has not filed a Rule 56 motion as to any claims asserted by plaintiffs.

4/ Deposition of J. Zoslaw (1979) 145:13-16; and Answers to WEA's Interrogatories, 5:1-5, 22:26-28.

5/ Examples cited in MTS-Tower's Reply Memorandum, pp. 3-7, filed July 5, 1979, Docket No. 746; MCA's Reply Brief, pp. 3, 14-18, filed July 5, 1979, Docket No. 747; Polygram's Closing Brief, pp. 4-8, filed July 6, 1979, Docket No. 751. See also WEA's Reply Memorandum, pp. 3, 8, filed July 5, 1979, Docket No. 749.

6/ E.g., Document 71186 cited by Plaintiffs' Opposition Memorandum, p. 24:8-17, filed May 29, 1979, Docket No. 736.

7/ E.g., Document 9395, citied by Plaintiffs' Opposition Memorandum, supra (hereafter Plaintiffs' Memorandum), p. 21:8-17; Document 37333 cited by Plaintiffs' Memorandum p 40:23; Documents 7803, 7804, 7805 cited by Plaintiffs' Memorandum p. 25:22.

8/ E.g., references to exhibits in Plaintiffs' Memorandum at p. 31:20-9, p. 46:1 and 30, p. 50:28-9, p. 51:18-9, p. 59:21-22.

9/ See e.g., references to depositions in Plaintiffs' Memorandum at pp. 16, 36, 58, 59, 74, 79 and 80; and to Exhibits A and B in C. Zoslaw's Declaration in Opposition at p. 4.

The lack of proper authentication is aggravated by the fact that most of the documentary evidence entered as exhibits lacks signatures, letterheads, and other distinctive markings. For example, none of the exhibits which comprise the preponderence of plaintiffs' evidence on prices and advertising bear the name or the signature of the executor: i.e., Exhibits 6, 7, 9-4, 9-5, 9-12, 10, 14, 17, 20, 21 and 22.

10/ E.g., Plaintiffs' Memorandum p. 7:28-32 regarding the major distributors' purported control of "virtually all sales of phonograph records and tapes in the United States," and the centralization of retailing in California in the hands of a few favored retailers.

Plaintiffs' Memorandum at p. 15 regarding alleged concentration of the retail market.

Plaintiffs' Memorandim at p. 80 regarding the dangerous probability of success of MTS-Towers' alleged attempt to monopolize.

11/ E.g., Exhibit 5, Plaintiffs' Memorandum at p. 30:31 to 31:2; Exhibit 9-1 to 9-11, Plaintiffs' Memorandum at p. 31, and; Exhibit 16, Document No. 55029, Plaintiffs' Memorandum at pp. 45-6.

12/ These figures rely in part upon the questionable accuracy of M. Zoslaw's conclusion that in 1973 the dollar volume of drop sales was $57,236.80. (Zoslaw Declaration at ¶ 4.) Combining Mr. Zoslaw's figure for 1973 with the data previously submitted, the drop shiment total amounts to $90,369.71 or .475% of total sales. Contending persuasively that Zoslaw has doubler counted, MCA calculates the drop shipments at $74,151.49 or .44% of total sales for 1972-79. See MCA's Reply Brief, pp. 4-6, supra n. 5.

13/ Declaration of Otto Perry, ¶ 4 (uncontroverted).

14/ See n.1 supra.

15/ Plaintiffs' Memorandum merely states, without documentation: "The admission by [Polygram (UDC)] that it arranged for $213,000 in drop shipments raises inter-

state commerce jurisdiction as a matter of law." Plaintiffs' Memorandum at p. 15.

Las Vegas Merchant Plumbers Assn. v. United States, 210 F.2d 732 (9th Cir. 1954), the sole authority which explicitly applies the "affecting commerce" standard as opposed to the "in commerce" standard applicable here. Furthermore, in that case the drop sales were a "not insubstantial" addition to other significant amounts of interstate sales.

In contrast to plaintiffs' bald assertion that drop sales were $213,000, we note Polygram's careful calculation and documentation placing drop shipments in the range of 97.4 to 99% of Polygram (UDC)'s total sales. Polygram's Memorandum, pp. 11-15, filed March 15, 1979, Docket No. 681.

16/ Sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(d) and 13(e) provide:

Payment for services or facilities for processing or sale.

> (d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers comnpeting in the distribution of such products or commodities.

Furnishing services of facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

17/ E.g., Affidavit of Charles Zoslaw, dated October 9, 1976, p. 1:26 to 2:20; Complaint, ¶18; and Plaintiffs' Memorandum at pp. 45-6. See also WEA's Memorandum at p. 23, filed March 16, 1979, Docket No. 688.

18/ Plaintiffs' Memorandum at p. 71.

19/ Indeed, plaintiffs have advanced no rationale as to why competing distributors would combine in order to lower prices for retail accounts. Such a combination is counter-intuitive. The more likely object of a combination among distributors would be to withstand demands by large accounts for lower prices.

Compounding the failure to explain the motivation for the purported combination to lower retail prices, plaintiffs inconsistently assert the existence of a distributors' scheme to maintain retail prices. Compare Plaintiffs' Memorandum pp. 36-7, which allege low selling practices with pp. 48-50, which allege price maintenance.

Plaintiffs' only reference to the required showing of motivation is a single

sentence which reads "The reward of group conspiracy, the raising of list and cost prices, the ease of early market penetration with albums, but with extensive returns allowed to the favored chains, the control of entry into distribution provided the motivation."

This conclusory allegation, hardly amounts to a showing of motivation and is without support in the record.

20/ Section 2 of the Clayton Act, 38 Stat. 730 (1914)--later amended by the Robinson-Patman Act--which made price and promotional discriminations unlawful under certain circumstances was enacted because the Sherman Act did not proscribe such discriminations.

The Senate Report on the Clayton Act states "The Bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful; certain trade practices, which, as a rule, singly and in themselves, are not covered by the [Sherman Act]." S. Rep. No. 698, 63d Cong., 2d Sess. at 2.

In the House debate on the Clayton Act, Representative John C. Floyd, one of the three framers of the Act, stated that price discrimination "has never been held to be a violation of the Sherman Law, and, in my opinion, such act of discrimination is not within the purview of the Sherman Law as it now exists . . ." House Debate, 63d Cong., 2d Sess., May 25, 1914, at 9200, reprinted in 2 E. Kinter, The Legislative History of the Federal Antitrust Laws and Related Statutes, p. 1325 (1978). See also 15 Cong. Rec. 9199-9200 (1914).

21/ E.g., Plaintiffs' Memorandum pp. 34, 58-60, 78-9.

APPENDIX C

STATUTES INVOLVED

15 U.S.C. 15, Section 4 of the Clayton Act, 38 Stat. 731, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide (Sherman Act Section 1 and 2, July 2, 1890, Chapter 647, Sections 1, 2, 26 Stat. 209, 15 U.S.C., Sections 1, 2):

"Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby

declared illegal...."

"Section 2: Every person who shall monopolice or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor...."

APPENDIX D

ROBINSON-PATMAN ACT AMENDMENT TO SECTION 2 OF THE CLAYTON ACT

15 U.S.C.A. §§ 13-13a

[Approved June 19, 1936]

Sec. 2(a) Discrimination in price.

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition

with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than

those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Meeting competition defense.

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case

thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of brokerage.

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of

goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, or any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Discriminatory payments for services or facilities.

That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on propor-

tionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Discrimination in furnishing services or facilities.

That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Buyer liability for inducing or receiving discriminatory prices.

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. [15 U.S.C.A. § 13.]

DECLARATION OF SERVICE
BY MAIL

I am a citizen of the United States and employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within above entitled action. My business address is 50 California Street, Suite 955, San Francisco, California. On this date, I served the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by placing 3 true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at San Francisco, California, addressed as follows:

William Billick, Esq.
Rosenfeld, Meyer & Susman
444 United California Bank Bldg.
9601 Wilshire Boulevard
Beverly Hills, CA 90210

Charles F. Gray, Jr., Esq.
Gray & Thurn
195 Cadillac Drive
Sacramento, CA 95825

George A. Cumming, Jr., Esq.
Brobeck, Phleger & Harrison
One Market Plaza
Spear Street Tower
San Francisco, CA 94105

M. Laurence Popofsky, Esq.
Heller, Ehrman, White & McAuliffe
44 Montgomery Street, Suite 3000
San Francisco, CA 94104

John Curran Ladd, Esq.
Morgenstein, Ladd & Jubelirer
255 California Street
San Francisco, CA 94111

Melvin R. Goldman, Esq.
Morrison & Foerster
One Market Plaza
Spear Street Tower
San Francisco, CA 94105

Robert Fremlin
Lillick, McHose & Charles
Two Embarcadero Center
San Francisco, CA 94111

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, on February ___, 1983.

_____
Maxwell Keith

Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1430

In the Supreme Court

OF THE

United States

CHARLES ZOSLAW AND JANE ZOSLAW,
Petitioners,

vs.

MCA DISTRIBUTING CORP.;
DOUG ROBERTSON ADVERTISING, INC.;
MTS, Inc.; TOWER ENTERPRISES, INC.;
WARNER/ELEKTRA/ATLANTIC CORP.;
ABC RECORDS, INC.;
POLYGRAM DISTRIBUTION, INC.;
CAPITOL RECORDS, INC.; AND
CAPITOL INDUSTRIES-EMI, INC.,
Respondents.

Brief of Warner/Elektra/Atlantic Distributing Corporation, ABC Records, Inc., MCA Distributing Corporation and Polygram Distribution, Inc. in Opposition to the Petition for Writ of Certiorari

ROBERT J. VIZAS
RENÉ P. TATRO
MATTHEW L. LARRABEE
HELLER, EHRMAN, WHITE
& MCAULIFFE
44 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 772-6000
Of Counsel

M. LAURENCE POPOFSKY
44 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 772-6000
Counsel of Record
for Respondent
Warner/Elektra/Atlantic
Distributing Corporation

[Counsel continued on inside front cover]

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTIONS PRESENTED

1. When (a) the District Court grants summary judgment on two independent grounds, (b) the Court of Appeals affirms on both grounds, either of which is a sufficient basis for affirming the district court, and (c) Petitioners only seek a writ as to one ground, is a writ proper since there is an unchallenged basis for the ruling below?

2. Is Supreme Court review necessary for a fact specific conspiracy case where there is no issue respecting the controlling principle of law?

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No. 82-1430

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ABC RECORDS, INC.;
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CAPITOL RECORDS, INC.; AND
CAPITOL INDUSTRIES-EMI, INC.,
Respondents.

Brief of Warner/Elektra/Atlantic Distributing Corporation, ABC Records, Inc., MCA Distributing Corporation and Polygram Distribution, Inc. in Opposition to the Petition for Writ of Certiorari

Respondents Warner/Elektra/Atlantic Distributing Corporation ("WEA"), ABC Records, Inc. ("ABC"), MCA Distributing Corporation ("MCA") and Polygram Distribution, Inc. ("Polygram") submit this Brief in Opposition only as to questions 1 and 4 in the Petition (the § 1 Sherman Act claims). Petitioners' questions 2 and 3 relate to claims by Petitioners against other defendants below and do not affect Respondents.

I

STATUTES INVOLVED

As to Respondents, the statutory provisions are § 1 of the Sherman Act, 15 U.S.C. § 1 and § 15 of the Clayton Act, 15 U.S.C. § 15.

II

CONCISE STATEMENT OF CASE

A. Nature of the Case

Petitioners Charles and Jane Zoslaw, dba Marin Music Centre, filed this action in 1975 alleging violations of the Sherman Act and the Robinson-Patman Act by Respondents and other distributors and retailers of phonograph records and tapes. Petitioners, with no prior experience in retail sales of phonograph records or pre-recorded tapes, opened Marin Music Centre ("Marin Music") in Mill Valley, California in 1965. Marin Music remained in operation until 1977 at which time Petitioners left the business because of their inability to meet the vigorous price competition in Marin County.

Petitioners initially alleged that Respondents violated Sections 2(a), 2(d), and 2(e) of the Robinson-Patman Act by granting some San Francisco bay area retail record and tape outlets more favorable prices, credit terms, and advertising arrangements than those granted to Petitioners.

Petitioners' Sherman Act claims against Respondents, although based on precisely the same conduct, are not as straightforward. Petitioners advanced two basic theories of Sherman Act liability:

1. The "Overall Conspiracy" Theory

Each Respondent allegedly conspired with all other defendants, both distributors and retailers, to "fix the market" by selecting certain chain retailers to control and monopolize the retailing of records and tapes, and discriminating in favor of the selected retailers.

2. The "Vertical Conspiracy" Theory

Each Respondent allegedly entered into separate, two-party vertical combinations (the contracts between each Respondent and its customers) with each named retailer which caused discriminations in the sale of records.

B. Statement of Prior Proceedings

In January, 1975, Petitioners filed this action. They subsequently filed three amended complaints adding various defendants and factual contentions. As amended, the complaint stated various claims against Respondents (who are record distributors), six other record distributors, three record retailers, and an advertising agency.

Petitioners' initial claim against Respondents and the other distributor defendants was for violation of § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) alleging discriminatory pricing in favor of retail chain stores, and violations of §§ 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(d) and 13(e), alleging discriminatory promotional allowances and special services.

On June 21, 1976, Petitioners' Robinson-Patman claims were dismissed on jurisdictional grounds.[1] In an attempt to resurrect their failed discrimination claims, Petitioners

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[1]This dismissal has since been reversed and remanded to the District Court for further proceedings.

commenced prosecuting their discrimination claims under the guise of a § 1 Sherman Act claim.

After several years of discovery, the district court granted Respondents' summary judgment motions on the Sherman Act claim for two separate reasons:

1. Petitioners "regularly and systematically violated Rule 56 of the Federal Rules of Civil Procedure" by submitting hundreds of unorganized, unauthenticated documents which "often failed to support the factual inference for which they had been provided." See Petitioners' Appendix A-8, A-34; B-12, B-18;[2] and

2. Respondents "clearly met their burden of proof" under Rule 56 of the Federal Rules of Civil Procedure by showing "the absence of a genuine issue as to any material fact," and Petitioners' Opposition, even when all evidence was construed, and all inferences were drawn, in the light most favorable to Petitioners, "failed to controvert defendant's showing. [Petitioners] have not produced any competent evidence from which it could be inferred that the alleged violations occurred." See Petitioners' Appendix B-19.

The Ninth Circuit Court of Appeals affirmed the judgment of the district court on both grounds.

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[2]For purposes of brevity, we refer here to the Appendices attached to the Petition.

C. Statement of Facts[3]

1. Marin Music Centre and the Marin County Market

Notwithstanding Petitioners' extensive, confusing and unsupported "Statement of the Case", the facts remain straightforward and largely uncontroverted.

Petitioners' single retail outlet experienced startup losses in 1965 and 1966, but claimed to have a profit for the following two years. Thereafter, due to increased competition from other retailers, the store again encountered financial difficulties, suffering losses from at least 1971 until it went out of business in 1977. See Petitioners' Appendix A-3.

During the time Petitioners were in business, the Marin County record market changed dramatically. Several other retail record and tape stores opened in the area and the number of department stores, grocery stores and drug stores with record departments also increased. Petitioners readily admitted that their store suffered losses because other stores sold records at a lower price. Simply put, Petitioners were unable to meet the vigorous price competition in the retail record business. See Petitioners' Appendix A-3, 4.

2. Synopsis of Facts Relating to Respondents

Respondents are all distributors of records and tapes, and each distribute records and tapes to retail customers and subdistributors in the San Francisco bay area, includ-

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[3]Petitioners' "Concise Statement of the Case" is 40 pages long and contains numerous conclusory allegations unsupported by the record. Given the space limitations on this Opposition, Respondents will not attempt to refute each of these misstatements individually.

ing up until it closed, Petitioners. Each Respondent did business with Petitioners on the same basis that it did business with other retailers similarly situated.

Respondents' pricing systems resemble one another insofar as they distinguished in price according to the function performed by the purchaser. That, however, is where the similarity ends.

The focal point of Petitioners' conspiracy allegations is that Respondents agreed with each other, and with other distributors and/or retailers regarding prices and account classifications. Petitioners presented no direct proof of such a conspiracy, and each Respondent denied these allegations in the trial court by way of sworn affidavits establishing that each Respondent made its pricing decisions unilaterally, and without consulting or agreeing with any other distributor. Each Respondent's decision was based on its independent assessment of competitive systems, its own cost efficiencies and its own costs. See Petitioners' Appendix A-38. Indeed, the wide diversity of cost classifications and "exceptions" shown in this record belie any conspiratorial conduct.

For example, Respondent WEA made the unilateral decision to adopt a two-level pricing system, based upon the necessity to meet the prices offered by its competitors and upon the belief that certain cost efficiencies could be realized through using subdistributors. While other distributors' systems were similar, they were far from identical. Respondent WEA's system varied significantly from those of its competitors, including in some instances the number of "tiers" or levels of functional distinction.

Similarly, the advertising decisions of each Respondent were reached independently. The primary factor in allocating advertising funds is the desire to achieve the greatest sales return on advertising expenditures. Each Respondent established below that it attempted to allocate advertising fairly among those purchasers requesting such funds. In fact, Petitioners received more than their share of advertising funds from Respondent WEA as a proportion of sales.

Finally, all of Respondents' credit policies and decisions were arrived at independently. Respondents never agreed with anyone on the terms of credit that would be extended to Petitioners or the allegedly favored retailers. While not all of the retailer defendants received the same credit terms, this is unsurprising. The retailers named in this action vary from state-wide chains with "at least 100 outlets," to single store locations.

3. Petitioners' "Proof" of Their Claims Against Respondents

(a) The "Overall Conspiracy"

Respondents' affidavits in support of summary judgment all denied any "overall conspiracy", and Petitioners presented no direct evidence of conspiracy. As the Court of Appeals noted, Petitioners' "only chance depended on their presentation of circumstantial evidence sufficient to support the inference of a 'conscious parallelism' conspiracy theory and on such further inferences as [Petitioners] might be able to draw from trade association and credit managers' meetings among the various distributors." See Petitioners' Appendix A-36.

With respect to the conscious parallelism proof, both courts below ruled that:

—Petitioners failed to raise any issue of material fact as to whether or not there was sufficiently similar behavior among the defendants to invoke the doctrine of conscious parallelism (following *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963)). See Petitioners' Appendix A-36-37; B-29-31;

—Even if parallel business behavior had been proved, Petitioners did not demonstrate the existence of any action against the independent economic self-interest of any Respondent, the requisite "plus factor" (following *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41; *Syufy Enterprises v. National General Theatres, Inc.*, 575 F.2d 233, 236. (9th Cir. 1978), *cert. denied*, 439 U.S. 954 (1978); *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971)). See Petitioners' Appendix A-37-39; B-31-32;

—Petitioners' conscious parallelism claim was "deficient because it never established a plausible motivation" for the alleged conspiracy (following *First National Bank v. Cities Service Co.*, 391 U.S. 253, 287 (1968); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975)). See Petitioners' Appendix A-39-41; B-32.

With regard to the trade and credit manager association meetings, the Ninth Circuit followed *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 575 (1925) in ruling that, "in the absence of any indication of

agreement or consent to an illegal arrangement, [evidence which Petitioners had no hope of providing here] evidence of industry meetings is not sufficient to prove a conspiracy." See Petitioners' Appendix A-41.

(b) The "Vertical Conspiracy"

As the sole basis for its "vertical conspiracy" claims, Petitioners pointed to the two-party sales arrangements between individual distributors and individual retailers. Petitioners claimed that these arrangements "caused discrimination in the sale of phonograph records and tapes to the named retail chain stores." However, Petitioners raised no genuine issue of material fact that any such arrangement was intended to or had the effect of excluding retail competitors from the market, and all the evidence—including Petitioners' own admission—showed that the retail market was extremely competitive and probably had benefited by the alleged discrimination.

III

REASONS FOR DENYING WRIT

A. Overview

There is nothing worthy of certiorari in this case. The rulings of both courts below (and, for that matter, the Petition itself), make it clear that (1) this is a fact specific controversy; (2) there is no conflict between this decision and any decision of this Court or any other circuit; (3) this controversy mainly affects the litigants and does not present issues of national importance which require review by this Court. See Rule 17 of the Rules of the Supreme Court of the United States. Moreover, both courts below made rulings which are not challenged by Petitioners

—rulings which make the decisions below correct without regard for the questions sought to be raised by the petition. Thus, the Supreme Court would be unlikely to reach the point of alleged importance.

This is a perfect example of Petitioner preying on the reluctance of courts to grant summary judgment in antitrust cases. Petitioners hope to "wave the magic wand of *Poller*" over their deficient facts and faulty legal theories and take this case to a jury. Under Petitioners' standard, there would be no summary judgment in antitrust cases as long as plaintiff had a well-pleaded complaint, a stack of documents, and a hope that something would develop at trial to controvert the undisputed evidence that there was no conspiracy. That simply is not the standard articulated by this Court. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968).

B. Certiorari Is Unnecessary on the Section 1 Claims because There Is an Independent Basis for the Rulings Below Which Petitioners Do Not Challenge Here

Petitioners attempted to demonstrate below the existence of issues of material fact by placing into the record thousands of pages of unorganized, irrelevant and unauthenticated documents. As one of the two bases for summary judgment, the trial court ruled that Petitioners' reliance on this "ersatz evidence" did not properly oppose the motion under Rule 56 of the Federal Rules of Civil Procedure. The Court of Appeals affirmed the District Court judgment on this ground, as well as others. This finding—which Petitioners do not even mention, much less seek to have reviewed—is alone a sufficient reason to deny the writ. Petitioners do not challenge the fact that its papers

opposing the summary judgment "regularly and systematically violate[d] the rules governing responses to motions for summary judgment," and thus failed to raise any issue of material fact. See Petitioners' Appendix B-11.[4]

Both lower court opinions are replete with examples of Petitioners' failure to adequately oppose Respondents' summary judgment motion. This Court is respectfully referred to the Circuit Court Opinion at pp. A-8, A-31-33 of Petitioners' Appendix and the District Court Opinion at pp. B-11-20 of Petitioners' Appendix for a complete explication of Petitioners' abuses of Rule 56 of the Federal Rules of Civil Procedure.

There is no conflict among the decisions of the circuit courts about this ruling; it is the result of a straightforward application of Rule 56 of the Federal Rules of Civil Procedure. Indeed, Petitioners do not suggest that anything the lower courts did here was improper. Respondents respectfully submit that this ruling makes it unnecessary to carry the inquiry on the Petition any further.

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[4]Indeed, one need look no further than the Petition itself to find numerous examples of Petitioners' disregard for important procedural requirements. Supreme Court Rule 20.5 provides that "the failure of a petition to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the petitions requiring consideration will be a sufficient reason for denying his petition." Yet, in their 63-page petition, Petitioners nowhere set forth with brevity and clearness what factors make this controversy worthy of review by the Supreme Court.

C. The "Overall Conspiracy"

1. Petitioners' Alleged "Overall Conspiracy" Is an Ordinary Conspiracy Claim Which Is Fact Specific and as to Which There Is No Conflict among Decisions

Unable to marshall direct evidence of an "overall conspiracy", in the district court Petitioners relied exclusively on the doctrine of conscious parallelism to raise an issue of material fact.[5]

There is no conflict as to the principles of conscious parallelism that control this case, and Petitioners do not suggest (much less demonstrate) that there is.[6]

Petitioners' conscious parallelism proof did not fail below because the wrong standard was applied or because there is a conflict among circuit court decisions. On the contrary, Petitioners' claim failed below because, on the basis of the undisputed facts (and drawing all inferences most favorable to Petitioners) they raised no genuine issue of material fact as to the existence of parallel conduct, and further, they raised no genuine issue of material fact as to whether or not the allegedly parallel conduct was

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[5]In the Court of Appeals, Petitioners asserted for the first time that certain trade and credit association meetings are circumstantial evidence of a conspiracy. This new argument is discussed below.

[6]Indeed, in a brief recently submitted to the Court, the Solicitor General has articulated the requisites for the doctrine in a manner perfectly consistent with the standard applied by the Ninth Circuit in this matter. *See* Brief for the United States as Amicus Curiae, *Weyerhaeuser Company and Willamette Industries, Inc., Petitioners v. Lyman Lamb Company, et al.*, and *Georgia-Pacific Corporation, Petitioner v. Lyman Lamb Company, et al.*, Nos. 81-1618 and 81-1619, at pages 4, 6-11.

contrary to the economic self-interest of each defendant acting alone.

Petitioners do not—and cannot—assert that this is not the correct standard or that there is a conflict in the circuits regarding this standard. Petitioners' argument simply comes down to this: they believe that the Ninth Circuit did not see in the facts the conclusions Petitioners wanted drawn. Petitioners' disagreement with the Ninth Circuit as to what the facts mean does not in any way necessitate review by this Court.[7]

2. Trade Association Meetings

In the Ninth Circuit, Petitioners urged for the first time that Respondents' participation in trade association meetings and credit managers meetings (at which historical credit information was sometimes exchanged) demonstrates the existence of a conspiracy. Here, again, the issue raised by Petitioners is not the legal standard—in which Petitioners apparently concur—but whether or not the facts support the rulings of the courts below.

The Circuit Court applied the Court's rule from *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 575 (1925): absent any indication of agreement or consent to an illegal arrangement, evidence of industry meetings is not sufficient to prove a conspiracy. Petitioners do not challenge this standard, or claim that it conflicts with the standard applied by any other circuit.

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[7]Respondents submit, of course, that both the District Court and the Ninth Circuit Court articulated and correctly applied the appropriate standard. Both the courts below concluded that the undisputed facts showed an absence of conduct sufficiently similar even to apply the doctrine of conscious parallelism, and, even if the doctrine were applied, the undisputed facts showed that the actions were in the independent economic interest of each defendant.

The Circuit Court found that even when all inferences are drawn in Petitioners' favor, there simply was no genuine issue of material fact—indeed, Petitioners offered no evidence whatsoever—that Respondents exchanged price information (as happened in *United States v. Container Corp.*, 393 U.S. 333, 335 (1969)), or that any Respondent went beyond the bounds of propriety in exchanging credit information for the individual use of each member of the credit managers association in determining whether to grant credit. *See Cement Manufacturers Protective Association v. United States*, 268 U.S. 588 (1925).

3. Neither Of the Opinions Below Is In Conflict With United States v. Paramount

Petitioners' claim that the holding in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) allows them to proceed to trial under a number of "alternative theories", each of which (at least as to Respondents) is merely a variation on the "overall conspiracy" or "vertical" conspiracy theories. However, there is no conflict in any respect between either of the opinions below and *United States v. Paramount Pictures, Inc.*[8] Indeed, both courts below were fully cognizant of that case and were guided by its principles where appropriate.

Unable to articulate a coherent description of the overall conspiracy (*e.g.*, when or how it began, how it operated, what acts constitute it) or a plausible rationale for its existence, Petitioners point to the alleged result—discrimination—and urge that it must result from conspiracy.

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[8]In fact, Petitioners never expressly state how they believe the opinions below conflict with *Paramount*.

This, Petitioners claim, is the result mandated by *United States v. Paramount Pictures, Inc.*

Petitioners could hardly be more incorrect. Here, unlike the situation in *Paramount,* none of the Respondents had any financial interest whatsoever in any retail store, and had no motive to enter into such a conspiracy; there was no genuine issue of fact about those matters. There is no evidence that any alleged co-conspirators retailer pressured any of the Respondents to deal in any particular way with Petitioners. More importantly, there is no evidence or claim here of either retail price maintenance or wholesale price fixing among distributors, such as there was in *Paramount.*[9]

D. Petitioners' Alleged "Vertical" Conspiracy

The courts below dismissed Petitioners' vertical conspiracy claims on the following two separate grounds:

1. Vertical agreements—even discriminatory ones that would ordinarily form the basis for a secondary-line Robinson-Patman case—do not give rise to a Section 1 claim *absent proof of an agreement to exclude others from the buyer's market. See e.g., National Tire Wholesale, Inc. v. Washington Post Co.,* 441 F. Supp. 81 (D.D.C. 1977), *aff'd,* 595 F.2d 888 (D.C. Cir. 1979); *Rutledge v. Electric Hose & Rubber Co.,* 327 F. Supp. 1267 (C.D. Cal. 1971), *aff'd,* 511 F.2d 668 (9th Cir. 1975); *Giguere's Supermarkets, Inc. v. Hannaford Bros. Co.,* 1983 Trade Reg. Rep.

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[9]Presumably, Petitioner is not asserting that *Paramount* in any way bolsters its conscious parallelism proof, since *Paramount* is not a conscious parallelism case.

(C.C.H.) ¶ 65,243 (D. Ma. 1983).[10] There is no conflict among the circuits on this proposition. After reviewing the undisputed facts, and drawing all reasonable inferences in Petitioners' favor, both lower courts concluded that there was no basis for Petitioners' claim here.

2. Even if Petitioner proved a vertical agreement with an exclusionary effect, the arrangement would be judged by the rule of reason. Again, there is no conflict among the circuits as to this rule. *See, e.g., Martin B. Glauser Dodge v. Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Continental T.V. Inc. v. GTE Sylvania*, 433 U.S. 36 (1977). The courts below held that Petitioners could never have put on sufficient evidence to prove an unreasonable restraint of trade.[11] In fact, as the Ninth Circuit points out, the alleged price discrimination Petitioner complains of actually stimulated and enhanced competition in Petitioners' market. See Petitioners' Appendix A-45-47.

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[10]It is axiomatic that the protections of the Robinson-Patman Act would be wholly unnecessary if the Sherman Act reached simple discrimination claims such as Petitioners assert. This is clearly confirmed by the legislative history of the Robinson-Patman Act. (S. Rep. No. 698, 63d Cong., 2d Sess. at 2.); House Debate, 63d Cong., 2d Sess., May 25, 1914, at 9200, reprinted in 2 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes*, 1325 (1978). *See also Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 63 (1953).

[11]Indeed, the District Court indicated that the record contained examples of competitive pricing, and that Petitioner "would have [the Court] construe the Sherman Act in a way that would interfere with the essence of trade and competition." Petitioners' Appendix B-33.

Either of these reasons is alone sufficient for the lower court rulings, and neither requires review by the Court, for the underlying legal principle is uncontroverted. Petitioner simply wants one more chance to have the alleged facts reviewed.

Nor does *Paramount* conflict with the rulings below that the vertical relations between one distributor and one retailer—even if such relations discriminate against Petitioner—are not *per se* violations of the Act.

In *Paramount*, the Court faced a myriad of horizontal and vertical restraints, including horizontal conspiracies to fix prices, to agree not to compete in numerous respects, and to employ unlawful tying arrangements. Significantly, the horizontal price fixing agreement was found to exist between all the defendants, which included businesses at every level in the chain of distribution. In addition, the Court found vertical agreements between distributors and exhibitors which included price fixing and unlawful tying arrangements.

Some of the producers, exhibitors, and distributors in *Paramount* were financially interdependent businesses. The discriminatory contracts found unlawful in *Paramount* directly benefited the favored exhibitors and their affiliates at all levels in the chain of distribution. This is in sharp contrast to the absence of ownership of retail stores by any Respondent. No Respondent has any retail outlets, and the same is true for each of the other distributor defendants, except Columbia, which had a single retail operation until 1976.

Only as a part of this massive scheme in *Paramount* did the Court find that some of the vertical contracts between

distributors and exhibitors, which themselves covered a wide range of practices, violated Section 1. The discriminations condemned in *Paramount* were part and parcel of a larger price fixing arrangement, but there is no evidence in this case of the pervasive horizontal and vertical price fixing which was so evident in *Paramount*. There, in the context of the broad range of illegal conduct, many types of otherwise non-violative business practices could form the basis for remedial orders. Yet it is impossible to see how that fact lends any credibility to Petitioners' arguments here.

IV

CONCLUSION

For the foregoing reasons this Court should decline to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

M. Laurence Popofsky
Counsel of Record
for Respondent
Warner/Elektra/Atlantic
Distributing Corporation

Robert J. Vizas
René P. Tatro
Matthew L. Larrabee
Heller, Ehrman, White
& McAuliffe
Of Counsel

R. Frederic Fisher
Two Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 421-4600
Counsel of Record for
Respondent
ABC Records, Inc.

Alf R. Brandin
Lillick, McHose & Charles
Two Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 421-4600
Of Counsel for
Respondent
ABC Records, Inc.

(Counsel continued on following page)

(Counsel continued from preceding page)

WILLIAM BILLICK
ROSENFELD, MEYER & SUSMAN
9601 Wilshire Boulevard
Beverly Hills, CA 90212
Telephone: (213) 858-7700
Of Counsel for Respondent MCA Distributing Corporation

ALLEN E. SUSMAN
9601 Wilshire Boulevard
Beverly Hills, CA 90212
Telephone: (213) 858-7700
Counsel of Record for Respondent MCA Distributing Corporation

JEFFREY R. WILLIAMS
MORGENSTEIN, LADD & JUBELIRER
255 California Street
San Francisco, CA 94111
Telephone: (415) 421-9320
Of Counsel for Respondent Polygram Distribution, Inc.

JOHN CURRAN LADD
255 California Street
San Francisco, CA 94111
Telephone: (415) 421-9320
Counsel of Record for Respondent Polygram Distribution, Inc.

Office - Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1480

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CHARLES ZOSLAW and JANE ZOSLAW,
husband and wife,
dba MARIN MUSIC CENTRE,
Petitioners,

vs.

MCA DISTRIBUTING CORPORATION, DOUG ROBERTSON ADVERTISING, INC., MTS, INC., TOWER ENTERPRISES, INC., WARNER/ELEKTRA/ATLANTIC CORPORATION, ABC RECORDS, INC., POLYGRAM DISTRIBUTION, INC., CAPITOL RECORDS, INC. and CAPITOL INDUSTRIES-EMI,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENTS MTS, INC. AND TOWER ENTERPRISES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MORRISON & FOERSTER
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
(415) 777-6000

MELVIN R. GOLDMAN
JACK W. LONDEN*
Attorneys for
MTS, Inc. and
Tower Enterprises, Inc.

*Counsel of Record

MORRISON & FOERSTER, SAN FRANCISCO, CA. • 100 NINTH ST. • S.F., CA 94103 • (415) 864-6000

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No. 82-1430

In the Supreme Court

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OPINION BELOW

The opinion of the court of appeals has been officially reported at 693 F.2d 870, in addition to the unofficial report cited in the petition.

COUNTERSTATEMENT OF THE CASE

This antitrust action was brought by petitioners, the owners of a retail outlet for phonograph records and tapes. Petitioners claimed in their original complaint that the defendants—record and tape distributors, three retailers, and an advertising agency—violated sections 2(a), 2(d), and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(d), and 13(e), by discriminating in favor of retail chain stores in granting favorable price and promotional terms and furnishing special services.[1] By amendment to the original complaint, petitioners added a claim that the distributor defendants conspired horizontally among themselves and vertically with the retailer defendants to favor retail chain stores, allegedly in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Finally, petitioners claim that MTS attempted to monopolize the retail record and tape market in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.[2]

Respondent MTS, Inc. ("MTS") is a retailer of records and tapes.[3] MTS operates two stores in the six San Francisco-Bay Area counties. Plaintiffs did not controvert the evidence below that MTS accounted for less than ten

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[1]No party has petitioned this Court to review the decisions below as to petitioners' Robinson-Patman Act claims.

[2]Petitioners' additional claim that MTS monopolized trade was abandoned on appeal and is not raised by the petition for certiorari. 693 F.2d at 889 n.23; App. at A68.

[3]Respondent Tower Enterprises, Inc., also named as a defendant, was a subsidiary that has been merged into MTS during the pendency of this action.

percent of the total retail record and tape sales in the six San Francisco-Bay Area counties. 693 F.2d at 888 & n.22; App. at A53, A54 & A68.

At the close of four years of discovery, the district court granted respondents' motions for summary judgment. The district court relied on two independent grounds for granting summary judgment in favor of respondents on the Sherman Act claims. First, in the face of an adequate initial showing by respondents in support of the motions for summary judgment, petitioners failed to comply with the requirements of Rule 56(e)[4] of the Federal Rules of Civil Procedure and Rule 220-8[5] of the Local

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[4]Rule 56(e) provides:

> (e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

[5]Local Rule 220-8 (renumbered 220-7 as of March 1, 1981) of the United States District Court for the Northern District of California provides, in pertinent part:

> *Affidavits and Declarations*
>
> Factual contentions made in support of or in opposition to any motion shall be supported by affidavits or declarations.

Rules of the United States District Court for the Northern District of California, which impose requirements of competency and authentication as to affidavits and other documents submitted in opposition to a motion for summary judgment. 533 F. Supp. at 546-48; App. at B11-B20. Second, the district court held that, aside from the procedural and evidentiary defects in petitioners' opposition to the motions for summary judgment, petitioners failed to present a viable legal theory that could sustain a judgment in their favor based on the factual showing made. 533 F. Supp. at 551-55; App. at B28-B41.

On appeal, the Ninth Circuit unanimously affirmed each of the district court's holdings as to the petitioners' Sherman Act claims. The court of appeals expressly affirmed the district court's reliance on Rule 56(e) of the Federal Rules of Civil Procedure and Rule 220-8 of the Local Rules of the United States District Court for the Northern District of California. 693 F.2d at 882-83; App. at A30-A34. As in alternative ground of decision, on the merits of the legal issues presented by petitioners' Sherman Act claims, the court of appeals like the district court found no legal basis for the claim of horizontal conspiracy in restraint

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Affidavits and declarations shall contain only facts, shall conform as far as possible to the requirements of Rule 56(e), Federal Rules of Civil Procedure, and shall avoid conclusions and argument. Any statement made upon information or belief shall specify the basis therefor. Affidavits and declarations not in compliance with this Rule shall be subject to being stricken in whole or in part. . . . Extracts from depositions, interrogatory answers, requests for admission and other evidentiary matter will be considered only if presented appropriately authenticated by affidavit or declaration.

of trade among the respondent record and tape distributors. 693 F.2d at 884-86; App. at A35-A43. The court of appeals rejected as a matter of law petitioners' claim of illegal vertical conspiracies between distributors and favored retailers. 693 F.2d at 886-87; App. at A44-A47. The court of appeals also affirmed the district court's holding that the evidence presented by petitioners could not supply the requisite elements of the claim that MTS attempted to monopolize trade in a relevant market. 693 F.2d at 887-89; App. at A48-A54.

REASONS FOR DENYING THE WRIT

I

BECAUSE PETITIONERS HAVE NOT CHALLENGED THE INDEPENDENT PROCEDURAL GROUND FOR THE DECISIONS BELOW, THIS CASE PRESENTS NO QUESTIONS WORTHY OF CERTIORARI JURISDICTION

The petition's statement of questions presented fails to address the first of the two independent grounds for the decisions below: petitioner's flagrant violation of the procedural requirements for opposing summary judgment, pursuant to Rule 56(e) of the Federal Rules of Civil Procedure and Local Rule 220-8 of the Local Rules of the United States District Court for the Northern District of California.

The rules establish procedural requirements as to competency and authentication of the evidentiary support for factual contentions submitted in opposition to summary

judgment. The requirements are entirely distinct from any question posed in the petition.[6]

This independent basis for the decisions below, not challenged by a question "set forth in the petition or fairly included therein", Rule 21(a), Rules of the Supreme Court, will not be considered by the Court, absent "plain error". Rule 34.1(a), Rules of the Supreme Court. Far from "plain error," there are no "special and important reasons" for the exercise of certiorari jurisdiction to review a case that would require this Court to consider the contents and authentication of evidentiary documents submitted by petitioners in the district court. Rule 17.1, Rules of the Supreme Court.

Petitioners could not, and do not even attempt to support their arguments in this Court without reliance on many of the "literally hundreds of pages of documents" held by the courts below to have violated the requirements of Rule 56(e) and Local Rule 220-8. 693 F.2d at 883; App. at A33. Thus, there is no way for this Court to consider separately the substantive questions of antitrust law posed by petitioners.

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[6]Question 4 of petitioners' statement of questions presented purports to address the constitutionality of the decision below that no jury trial is required. Petition at 3. The constitutionality of summary judgment procedures has long been established. *See, e.g., Fidelity and Deposit Co. of Maryland v. United States*, 187 U.S. 315, 320 (1902); *see also* 6 J. Moore, Moore's Federal Practice ¶ 56.06[2] (2d ed. 1982).

II

THE HOLDINGS BELOW UNDER SECTION 1 OF THE SHERMAN ACT ARE CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

Petitioners argue that their opposition to respondents' motions for summary judgment raised genuine issues for trial regarding the existence of horizontal and vertical conspiracies in restraint of trade, in violation of Section 1 of the Sherman Act. Notwithstanding petitioners' scattershot citation of cases decided by this Court, the courts below correctly rejected petitioners' attempt to support this claim of conspiracy with evidence of purported uniformity in the distributor's treatment of chain retailers. As noted only two years ago, " 'this Court has never held that proof of parallel business behavior [by itself] conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense' ", *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 637 n.9 (1981), *quoting Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954). The courts of appeals of seven circuits have developed the rule, applied in this case, that evidence of parallel conduct, standing alone, does not raise a triable issue as to conspiracy.[7] Moreover, parallel conduct among *distributors* could not, by itself, sustain a rational inference that a retailer such as MTS was a conspirator.

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[7]*See, e.g., Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 327 (D.C. Cir.), *cert. denied*, 103 S.Ct. 86 (1982); *Weit v. Continental Illinois National Bank & Trust Co. of Chicago*, 641 F.2d 457, 462 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir. 1980); *Pan-Islamic Trade Corp. v.*

Petitioners focus on evidence that distributors' credit managers met.[8] The court of appeals reviewed this evidence and found only the exchange of information regarding retailers' credit histories, permitted under *Cement Manufacturers Protective Association v. United States*, 268 U.S. 588, 600 (1925). 693 F.2d at 885-86; App. at A41-A42. Petitioners miss the point in their attempt to invoke *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*), *Catalano* addressed the question whether a horizontal agreement to fix credit terms would be illegal *per se*, not the question whether such an agreement among competitiors could be *inferred* from their exchange of credit information. Expressly distinguishing the latter question, this Court in *Catalano* relied upon *Cement Manufacturers Protective Association v. United States. Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. at 648 n.12.

Thus, applying well-settled precedent from this Court and the court of appeals, the Ninth Circuit correctly disposed of petitioners' horizontal conspiracy claims.

Petitioners also argue that this case involves a triable issue as to vertical conspiracies between each record and tape distributor and each chain retailer. However, the only evidence of vertical arrangements petitioners presented was that distributors sold records and tapes to retailers such as MTS at prices and on other terms of sale that

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Exxon Corp., 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Syufy Enterprises v. National General Theatres, Inc.*, 575 F.2d 233, 236 (9th Cir.) *cert. denied*, 439 U.S. 954 (1978); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 885 (8th Cir. 1978); and *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 111 (2d Cir. 1975).

[8]Petitioners made no showing that MTS took part in any meetings among distributors' credit managers.

were favorable when compared to the terms of the separate contracts of sale to petitioners' store. 693 F.2d at 886; App. at A45. Petitioners presented no evidence of any agreement between a distributor and MTS that restricted the terms of the distributors' sales to petitioners or any other third parties. *Id.*

The court of appeals held that no *per se* violation of section 1 of the Sherman Act and no unreasonable restraint of trade could be found based solely on sales contracts that did not "in any way restrict either party's dealings with others." 693 F.2d at 886; App. at A45, *quoting National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F.Supp. 81, 81 (D.D.C. 1977), *affirmed*, 595 F.2d 888 (D.C. Cir. 1979). Ample recent authority stands for the same principle. *See, e.g., Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 337-38 (D.C. Cir.), *cert. denied*, 103 S.Ct. 86 (1982); *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195, 1203-05 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Sitkin Smelting and Refining Co. v. FMC Corp.*, 575 F.2d 440, 448 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978); *Sausalito Pharmacy, Inc. v. Blue Shield of California*, 544 F.Supp. 230, 237 (N.D. Cal. 1981), *affirmed*, 677 F.2d 47 (9th Cir.) (*per curiam*), *cert. denied*, 103 S.Ct. 376 (1982).[9]

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[9]Petitioners' reliance on *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), is misplaced. Unlike this case, *Paramount* involved evidence of an industry rife with horizontal and vertical price-fixing agreements, 334 U.S. at 142, as well as vertically integrated motion picture distributors and exhibitors and other vertical profit-sharing contracts, 334 U.S. at 149-50, that could sustain an inference that distributors employed disparate treatment of exhibitors to exclude unfavored exhibitors from the market. There is no basis in the instant case for such an inference, and no other

After carefully considering the evidence petitioners offered regarding the vertical arrangements between distributors and favored retailers, both courts below concluded that the facts upon which petitioners rely are not susceptible of the interpretation that respondents unreasonably restrained trade. Such a legal conclusion is proper on summary judgment. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

III

THE COURTS BELOW CORRECTLY APPLIED WELL-SETTLED PRINCIPLES IN REJECTING THE CLAIM OF ATTEMPTED MONOPOLIZATION

Petitioners seek review of the question whether MTS can be held liable under Section 2 of the Sherman Act for predatory pricing based on evidence of sales at prices above its own costs but below petitioners' costs. Petition at 2, Question 2. This question is squarely answered in the negative according to principles that are unanimously accepted by the courts of appeals and consistent with the decisions of this Court. Indeed, petitioners cite not a single case in which a court has found predatory pricing or an attempt to monopolize on comparable facts.

There is no conflict among the circuits on the dispositive legal principles. Pricing can be held predatory and condemned under Section 2 of the Sherman Act, absent evi-

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facts to support an inference that differences in terms of sale to different record and tape retailers constituted an unreasonable restraint of trade. Moreover, in *Paramount*, the contracts licensed theatres in a given area to give successive, exclusive exhibitions of motion pictures. 334 U.S. at 144-45. Such a contract inherently restricts the distributor's dealings with other exhibitors, unlike the contracts between distributors and retailers in this case.

dence of actual monopoly, only if the well-settled elements of attempted monopolization are satisfied: (1) specific intent to monopolize; (2) conduct designed to implement that intent; and (3) a dangerous probability of success. 693 F.2d at 887. App. at A48.[10]

Notwithstanding petitioners' repeated emphasis of an unauthenticated quotation from the president of MTS,[11] the courts below correctly concluded that there was no evidence of specific intent to monopolize. 693 F.2d at 887; App. at A49-A50. The court of appeals refused to allow an inference of such intent from conduct consisting of setting prices at levels concededly above MTS's costs, absent evidence of other factors tending to establish the elements of attempted monopolization. 693 F.2d at 888; App. at A51-A52. This conclusion resulted from a straightforward application of a standard this Court declined to review last term. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1030, 1036 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982) (Docket No. 81-2083). The Ninth Circuit's conclusion accords with

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[10]*See, e.g., Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 93 n.9 (3d Cir. 1982); *William Inglis & Sons v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1027 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981); *Northeastern Telephone Co. v .AT&T*, 651 F.2d 76, 85, 87-88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). *See also* cases cited in Handler & Stever, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 145 n.63 (1980).

[11]Aside from petitioners' failure to authenticate any evidence of the quotation, a statement that MTS would "zing" its competitors simply suggests a pro-competitive desire to outsell other retailers. Such evidentiary details do not, in any event, merit this Court's attention.

the criteria for predatory pricing adopted by other circuits.[12]

The district court specifically addressed the third element of attempted monopolization as well, concluding that there was no basis for inferring, from MTS's pricing policies or from its ten percent market share, that there was a dangerous probability that it would succeed in monopolizing trade in a relevant market. 633 F. Supp. at 555; App. at B41.

In short, this case could have presented a question regarding predatory pricing worthy of certiorari jurisdiction only if the courts below had reached the opposite conclusion.

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[12]*See e.g., MCI Communications Corp. v. AT&T*, 5 Trade Reg. Rep. (CCH) ¶ 65,137 (7th Cir. Jan. 12, 1983); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 822-24 (6th Cir. 1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *Northeastern Telephone Co. v. AT&T*, 651 F.2d at 88-90; *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

CONCLUSION

For each of the reasons stated herein, respondents MTS, Inc. and Tower Enterprises, Inc., submit that the petition for certiorari should be denied.

Respectfully submitted,

MELVIN R. GOLDMAN
JACK W. LONDEN*
MORRISON & FOERSTER
Attorneys for
Respondents
MTS, Incorporated and
Tower Enterprises,
Incorporated

*Counsel of Record

STATEMENT PURSUANT TO RULE 28.1

MTS, Inc. has no parent corporation, affiliates, or partially-owned subsidiaries. Tower Enterprises, Inc., a former wholly-owned subsidiary, was merged into MTS, Inc. during the pendency of this action.

Office-Supreme Court, U.S.
FILED
MAR 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1430

In the Supreme Court

OF THE

United States

CHARLES ZOSLAW AND JANE ZOSLAW,
Petitioners,

vs.

MCA DISTRIBUTING CORP.;
DOUG ROBERTSON ADVERTISING, INC.;
MTS, Inc.; TOWER ENTERPRISES, INC.;
WARNER/ELEKTRA/ATLANTIC CORP.;
ABC RECORDS, INC.;
POLYGRAM DISTRIBUTION, INC.;
CAPITOL RECORDS, INC.; AND
CAPITOL INDUSTRIES-EMI, INC.,
Respondents.

Brief of the Capitol Companies in Opposition to the Petition for Writ of Certiorari

GEORGE A. CUMMING, JR.
One Market Plaza
Spear Street Tower
Suite 2800
San Francisco, CA 94105
Telephone: (415) 442-0900
Attorney for Respondents Capitol Records, Inc. and Capitol Industries-EMI, Inc.

Of Counsel:
RONALD M. FRIEDMAN
Capitol Records, Inc.
The Capitol Tower
Hollywood, CA 90028
Telephone: (213) 462-6252

BOWNE OF SAN FRANCISCO, INC. • 100 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTION PRESENTED

Faced with massive discovery in a $4,000 antitrust case, respondent Capitol Records "bought peace" by paying petitioners $7,500 in settlement. Capitol then decided not to sell any additional merchandise to petitioners, because of a threat of further litigation voiced by petitioners even as the settlement was being negotiated.

Properly framed, the question is whether this unilateral decision of Capitol Records violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Both courts below held that it did not.

No question at all is presented as to respondent Capitol Industries-EMI, Inc., parent of Capitol Records. It is merely a holding company, and is not mentioned in the opinion below, or in the petition here.

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CHARLES ZOSLAW AND JANE ZOSLAW,
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POLYGRAM DISTRIBUTION, INC.;
CAPITOL RECORDS, INC.; AND
CAPITOL INDUSTRIES-EMI, INC.,
Respondents.

Brief of the Capitol Companies in Opposition to the Petition for Writ of Certiorari

This brief is submitted by respondents Capitol Records, Inc. ("Capitol") and its parent, Capitol Industries-EMI, Inc.[1]

The opinion below is now reported in 693 F.2d 820 (9 Cir. 1982). As here material, it affirms a summary judgment for Capitol, granted by the district court in an opinion dated September 26, 1978. That opinion is unofficially reported *sub nom, Zoslaw v. CBS, Inc.*, 1978-2 Trade Cases (CCH) ¶ 62,269 (N.D. Calif. 1978).

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[1]All parties are listed in the caption. We advise the Court, per its Rule 28.1, that respondent Capitol Industries-EMI, Inc. is a wholly-owned subsidiary of THORN EMI, Ltd., a British company.

STATEMENT OF THE CASE

Petitioners owned a retail phonograph record store in a suburb of San Francisco. They were not franchisees or distributors, but merely purchased records order-to-order from various suppliers. In 1975, petitioners sued Capitol and most of the nation's other record manufacturers, alleging price discrimination under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). The complaint also contained allegations based upon the Sherman Act, but as the court below said: the "Sherman Act allegations come through as an attempt to breathe new life into [petitioners'] Robinson-Patman claims, by recasting them in the form of a conspiracy. . . ." (Pet.App. A-34, 35).

Capitol's gross sales of phonograph records to petitioners averaged only $3,800 per year, and the complaint sought $4,000 in damages. Capitol was promptly served with several sets of sweeping interrogatories, of the kind so frequently associated with the phrase "protracted antitrust litigation." Because of the enormous expense of responding to this discovery, and considering the very small amount of merchandise that Capitol had sold, it reluctantly opened settlement negotiations.

During these negotiations, petitioners' counsel stated that Capitol's prices violated the Robinson-Patman Act, and warned of further litigation unless Capitol changed its prices to his liking. Accordingly, counsel offered only a limited settlement, *viz.:* one enabling Capitol to "buy peace" (in his words) from the claims and discovery burdens of the pending litigation.

On June 10, 1975, Capitol settled the case by paying petitioners $7,500, a sum about equal to their gross purchases from Capitol in the preceding two years. The agreement released the Capitol companies from all claims existing as of June 10, 1975. However, consistent with the threat of further litigation voiced by counsel for petitioners during the settlement negotiations, the agreement also provided that it "shall not prejudice plaintiffs' rights to sue defendant for damages or other relief arising out of acts or omission which occur after the date of execution of this agreement." As the district court observed: "Both sides recognized that plaintiffs were unhappy with Capitol's pricing policies and that further litigation was a possibility."[2]

Having settled the case and wiped the slate clean, Capitol made a unilateral business decision not to sell any additional merchandise to petitioners. An amended complaint was promptly filed; it charged that Capitol's decision to discontinue sales violated Section 1 of the Sherman Act, 15 U.S.C. § 1. In 1978, after affording petitioners a full opportunity to conduct discovery, the district court granted a summary judgment for Capitol, phrasing its ruling thus:

> "[Capitol] has offered valid reasons, which are not anti-competitive, for its unilateral decision to refuse to deal with plaintiffs, including its small financial return from plaintiffs following its settlement therewith, and the prospect of continued litigation."[3]

The court below affirmed, holding that "Capitol's acknowledged purpose of avoiding future litigation whose costs exceeded the benefits from doing business with appellants

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[2] 1978-2 Trade Cases (CCH) ¶ 62,269, at page 75,672.

[3] *Id.*, page 75,673.

qualified as a legitimate business reason for refusing to deal." (Pet. App., pp. A-57, 58).

REASONS FOR DENYING THE WRIT

This case presents no novel or conflicting principle calling for the attention of this Court. The court below found itself in complete agreement with the views expressed by the Second Circuit in *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (1962), from which it quoted with approval (Pet.App. A-57). The *Simplicity Pattern* case *might* be characterized as one of "retaliatory" termination, but if so, then the present case is *a fortiori*. As the district court noted: "it is by no means clear that Capitol's conduct in this case can be assimilated within that doctrine. This is not the case of a defendant who terminates after the filing of a lawsuit, but rather of a defendant who settles the lawsuit, and then, with what must be considered a clean slate, refuses to deal in order to avoid the possibility of another lawsuit."[4]

Both courts below correctly distinguished the present case—a suit for damages—from decisions involving the discretionary exercise of a court's equitable powers to maintain the *status quo pendente lite*, and *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3 Cir. 1962), cited at p.58 of the petition, is merely one of those. Also cited is *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9 Cir. 1982). But it is not pertinent at all, and the judgment there was vacated by this Court on February 28, 1983. (No. 82-174, 459 U.S. ....., 51 U.S. Law Week 3363).

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[4]1978-2 Trade Cases (CCH) ¶ 62,269, at page 75,673.

As for the claim that Capitol refused to sell pursuant to a "conspiracy" with others, both courts below found that allegation to be unsubstantiated by any evidence. The petition merely rehashes the evidence peculiar to the case at bar, and thereby demonstrates the lack of general importance that is the touchstone of certiorari jurisdiction.

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

Dated: San Francisco, California
March 17, 1983

GEORGE A. CUMMING, JR.
Attorney for Respondents
Capitol Records, Inc.
and Capitol Industries-
EMI, Inc.

Of Counsel:
RONALD M. FRIEDMAN